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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF WASHINGTON,

CONTAINING

DECISIONS RENDERED FROM JANUARY 8, TO MAY 19, 1894, INCLUSIVE.

EUGENE G. KREIDER,
REPORTER.

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Rec. Sept. 7, 1894

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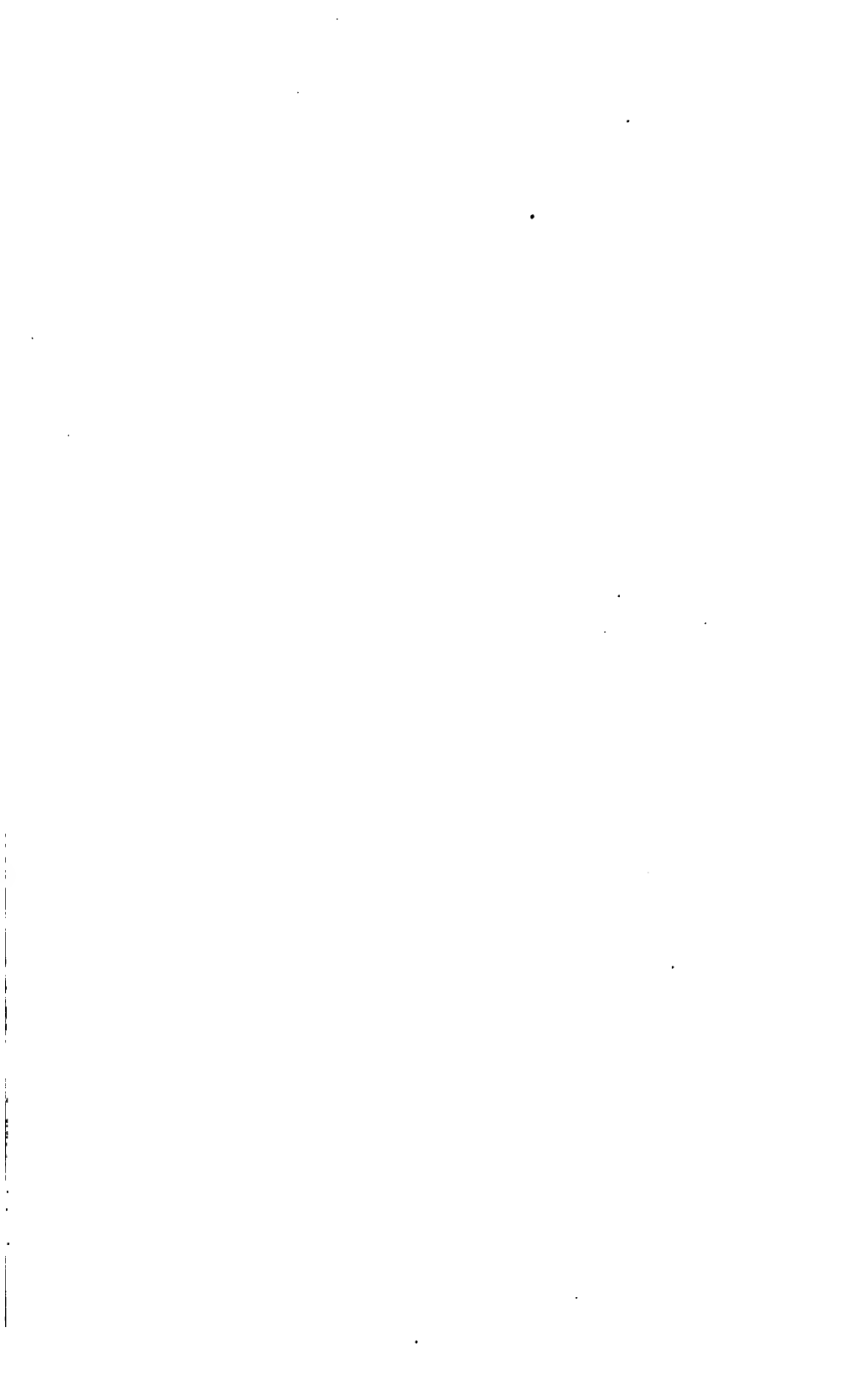


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REPORTS OF CASES
DECIDED IN
THE SUPREME COURT
OF THE
STATE OF WASHINGTON,
AT THE
JANUARY SESSION, 1894.

[No. 1062. Decided January 8, 1894.]

GENEVIEVE GARDNER AND ROSALIND BEMIS, *Appellants*,
v. THE PORT BLAKELY MILL COMPANY, *Respondent*.

HUSBAND AND WIFE—PURCHASE OF PUBLIC LANDS—SEPARATE
PROPERTY—EVIDENCE—EXECUTION OF DEED.

Lands acquired by a married man under the act of congress providing for the sale of timber lands are his separate property, and can be alienated without the consent of his wife. (DUNBAR, C. J., dissents.)

Where the validity of a deed as against third parties is contested on the ground that it was an unacknowledged instrument, as disclosed by the record in the auditor's office, the original deed itself, when purporting to be regularly acknowledged before a proper officer, is admissible in evidence without further proof of its execution.

Appeal from Superior Court, Kitsap County.

Fred. H. Peterson, for appellants.

Hughes, Hastings & Stedman, for respondent.

The opinion of the court was delivered by

SCOTT, J.—This action was brought to quiet title to a quarter section of land in Kitsap county, which, on the

8	1
10	33
35*	402
38*	766
8	1
122	541

12th day of July, 1882, was government land. On said date one William Cadwell made entry thereof under an act of congress entitled "An act for the sale of timber lands in the states of California, Oregon, Nevada, and in Washington Territory," approved June 3, 1878 (20 U. S. St. at Large, p. 89). At this time said Cadwell was the husband of the appellant Genevieve Gardner, and they were living together in the Territory of Washington, near the land in question. On the 20th day of January, 1883, a patent issued to said Cadwell under said act. July 15, 1882, said Cadwell executed a deed of said land to the respondent. The deed was drawn in form for his wife to sign, but she did not execute it and refused so to do. On January 18, 1890, the respondent placed this deed and the patent aforesaid, which was in its possession, on record.

On the 24th day of October, 1882, said Cadwell procured a decree of divorce from his said wife, annulling the bonds of matrimony theretofore existing between them. No property was brought before the court in this action, and no attempt was made to dispose of the property rights of the parties in any way in the decree which was therein rendered.

September 30, 1891, said Cadwell executed another deed purporting to convey said land to one Ella White Peterson, and on October 7, 1891, said Ella White Peterson, by deed, attempted to convey the same to appellant Bemis. This action was begun November 11, 1891. Neither of appellants have ever been in possession of said land, and it was at all times unoccupied. The respondent exercised acts of ownership thereover in looking after the timber to prevent its destruction, and paid the taxes assessed against the same from year to year. A trial was had, and the court below found in favor of the respondent.

It is contended by appellants that the land in question was community property at the time it was acquired by

Jan. 1894.] Opinion of the Court—SCOTT, J.

Cadwell, and also at the time he executed the deed aforesaid to the respondent, and that respondent at said times knew said Cadwell was a married man, and in consequence thereof, that the deed was void under the laws of the territory preventing a husband from conveying community real estate. Appellants claim to each own an undivided half of said land—appellant Gardner by virtue of its having been the community property of herself and Cadwell while they were husband and wife, and appellant Bemis by virtue of the deeds from Cadwell to Peterson and from Peterson to herself, above mentioned. It is contended by the respondent that this land was the separate property of said William Cadwell, and this is the principal question in the case.

By § 2 of the act in question the applicant is required to file a statement in writing and sworn to, containing the following, viz.:

“That deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself.”

The practice is to allow the husband and wife each to make an entry of one hundred and sixty acres of land under the provisions of this act in this state, and this can only be done upon the ground that land so acquired is the exclusive individual property of the person acquiring it. We know of no case where the point in question has been decided, but in the light of the provision of the act itself, and the practice of the government in allowing husband and wife to each make application under the act, sufficient authority is afforded, in our opinion, for holding that land so

acquired is the separate property of the person acquiring it; and it being an act of congress, it takes precedence of our laws relating to the acquisition of community property.

There is little or no proof as to whether the money used by Cadwell in paying for it was community property. There is some evidence tending to establish this, and also an attempt to prove the contrary, but admitting that the money so used was the property of the community, the situation would not be altered as to the ownership of the legal title to the land. As to whether the wife, on a showing that community money was used in the purchase thereof, could follow the same and obtain any rights in the land, we are not called upon to decide. Such an attempt would have to be made without unreasonable delay, and if sufficient appears in this case to establish such equitable claim upon the part of appellant Gardner, she would be estopped by reason of her delay in the premises from undertaking to affect the title thereto in the respondent. Appellant Bemis was not a *bona fide* purchaser without notice.

It is further contended that the court erred in allowing the original deed from Cadwell to the respondent to be received in evidence. It is contended by appellants that said deed was not acknowledged, and the record thereof fails to show any acknowledgment. The deed itself, when introduced, purported to have been regularly acknowledged before a notary public, and contains the certificate, signature and seal of such notary.

It is contended by the respondent that the certificate of acknowledgment is *prima facie* proof of the facts required to be recited therein, and this being true, no further proof of execution was necessary to render the deed admissible in evidence. Our statutes providing for the execution and acknowledgment of deeds name the officers before whom acknowledgments can be taken; and set forth the form of

Dec. 1894.] Dissenting Opinion—DUNBAR, C. J.

certificate in which the officer is required to state that the grantor has executed the instrument, and that the execution thereof was his voluntary act and deed. Gen. Stat., § 1437.

Section 1436, relating to acknowledgments taken without the state, provides that the certificate of acknowledgment shall be *prima facie* evidence of the facts therein recited. It cannot be supposed that the legislature intended to give greater force and effect to acknowledgments taken without the state than to those taken by like officers within the state. Furthermore, it is provided that a certified copy of a deed duly recorded shall be admitted in evidence, without further proof of execution. Gen. Stat., § 209; Code Proc., § 1685. We do not think the legislature meant to give to a certified copy any greater legal sanctity than could be given to the original document itself. Under the contention of appellants, the respondent had only to have its deed re-recorded if the original record thereof was incorrect, and then obtain a certified copy of such record, to have obviated the objections raised against it. We are of the opinion that the deed was properly admitted in evidence.

Affirmed.

HOYT and STILES, JJ., concur.

ANDERS, J., not sitting.

DUNBAR, C. J. (*dissenting*).—I am unable to agree with my brothers in the disposition of this case. I do not think that property rights of citizens of this state can be affected by any construction which departmental officers place upon the laws of congress. What is community property and what is separate property are questions which must be settled by a judicial construction of our own statutes enacted on that subject. Although I do not think it necessarily is implied by the action of the department in

allowing both husband and wife to purchase a timber claim that such claim becomes separate property. A husband and wife may both acquire various kinds of property; but without it is acquired in the way pointed out by the statute for acquiring separate property, it is plainly community property. The affidavit of the applicant is substantially the affidavit required of a homestead applicant, and shows on its face that it is simply to prevent fraudulent or speculative entries. Applying the construction uniformly given by this court to the community laws to the conceded circumstances of this case, the money with which the land in question was purchased was community property; and if that be true, the land which is purchased is equally community property. It seems to me hardly worth while to enlarge on this proposition. If then the land was community property, the original deed must be pronounced absolutely void; for the purchaser, as shown by the record, knew of the community relation; knew that Cadwell was a married man; knew that she was a resident of this state, and tried to get her to sign the deed, which she refused to do. There is no question of estoppel or of innocent purchaser in the case. The vendor bought with his eyes wide open, knowing the facts in the case, and he is presumed of course to have known the law. He, therefore, received nothing by the deed, and the wife was justified in absolutely disregarding the transaction. I am not able to agree with the other propositions urged by respondent, which the majority has not discussed, and believe the court erred in not sustaining the demurrer interposed to the answer.

Jan. 1894.]

Opinion of the Court—SCOTT, J.

[No. 914. Decided January 9, 1894.]

W. W. PHILBRICK, *Appellant*, v. AUGUSTUS ANDREWS,
Respondent.

DECREE FOR ALIMONY—WHEN SUBJECT TO RIGHT OF HOMESTEAD
—SELECTION OF HOMESTEAD.

Where, in an action for divorce, the property of the husband has not been brought into the case, a decree in favor of the wife for alimony creates no specific lien on the property; and the husband's right to a homestead exemption is paramount to the lien created by an execution levy under such judgment.

The provision of Laws 1877, p. 72, § 346, requiring the person claiming a homestead in certain real estate to cause the word "homestead" to be entered of record on the margin of his recorded title to such land, was repealed by the Code of 1881.

Where a judgment debtor with his family is occupying certain lands as a homestead, such occupancy amounts to the selection of a homestead, under the provisions of Code Proc., § 481.

Appeal from Superior Court, Jefferson County.

George W. Tyler, for appellant.

Johnson & Moody, for respondent.

The opinion of the court was delivered by

SCOTT, J.—Respondent and his two minor children of his first wife live upon certain land patented to him during the life of that wife, by the government, as a homestead claim. The first wife died and he married a second time, and his second wife procured a divorce from him. The decree of divorce adjudged that the wife have and recover of her husband (respondent here) the sum of \$1,500 as alimony, the same to be a "lien upon the property of the said defendant." No property, real or personal, was mentioned or described in the decree, nor does it appear that any property was described in the proceedings in said divorce action, the pleadings and proofs therein not having been made a part of the record in this cause.

8	7
9	89
35*	358
37*	312
8	7
10	255
10	643
35*	358
38*	1046
39*	235
8	7
17	436
8	7
21	238
8	7
24	143
24	147
8	7
26	218
26	219
8	7
30	54
8	7
32	98

A judgment for \$1,500 and the costs of the case was docketed June 19, 1891, and a general execution was issued thereon August 15, 1891. The sheriff proceeded to levy upon and make sale of the land above mentioned, which consisted of 160 acres in Jefferson county. At the sale appellant bid \$1,600 for the whole tract, and paid the officer \$50 cash, as he claims, to bind the sale, payment of the balance being promised upon the following day. But appellant refused to pay the balance upon the day named, or at all, and when the execution lapsed the sheriff returned it unsatisfied, with a statement of the facts and the \$50. This return was made in October, 1891. Subsequently, and in February, 1892, the plaintiff in the divorce suit moved, *ex parte*, for the confirmation of the sale to appellant, and in aid of said motion filed appellant's affidavit to the effect that he had paid to the plaintiff the sum of \$1,550 upon the day of the sale, in satisfaction of the judgment. The receipt of the plaintiff for the full sum was also filed. And thereupon, and on the same day on which the motion was filed, the court ordered the sale confirmed. After the expiration of the time of redemption, the sheriff executed to appellant a deed of the land, and this action of ejectment followed for the purpose of obtaining possession. Trial was had and judgment was rendered for the defendant.

The land in question was community property of the defendant and his first wife, and upon her death one-half of it descended to their minor children. There is no question but that the court had power in the divorce action to award the half belonging to the defendant, or any part of it, to the plaintiff, or to render a judgment for a sum of money and make it a specific lien thereon which would take precedence of a homestead exemption. But to do either it was necessary that the property should have been brought before the court (*Webster v. Webster*, 2 Wash. 417, 26 Pac.

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Opinion of the Court—SCOTT, J.

864), and the proper way to have done this was to describe it in the pleadings. *Bamford v. Bamford*, 4 Or. 30. If the property was not brought into said case by either party, the court had no jurisdiction over it and could not dispose of it therein, nor create a specific lien thereon. It was for the plaintiff in this case to show that the facts were such as to give the court this authority, and in the absence of any showing to that effect, the judgment rendered in favor of the plaintiff therein could not be made a lien upon the defendant's property except by an execution levy, or by causing the judgment to be recorded in the office of the county auditor, under § 449, Code Proc., when, as in the case of other judgments, it would become a lien upon his real estate; but in either of these cases the defendant's right to a homestead exemption would be a paramount claim.

The only attempt to establish a lien in the decree was by the clause above quoted therefrom, and this was insufficient under the circumstances, at least to establish a specific lien which would take precedence of the right to a homestead exemption, and there could be no presumption that it did, because it did not purport to establish any lien upon any particular property. The fact that the judgment was in favor of the wife would make no difference. *Thompson on Homesteads*, §§ 79, 80. The court found, in the findings of fact in said divorce action, which were introduced in evidence in this action, "that the defendant is the owner of one hundred and sixty acres of land in this county and personal property, altogether of the value of seven thousand dollars." The only reference to such property is contained in this language.

Under § 481, Code Proc., every householder, being the head of a family, could select a homestead not exceeding \$1,000 in value, which was exempt from execution while occupied as such by such householder, or his or her family,

and such homestead could be selected at any time before sale. No way was pointed out as to how the same should be selected. Sec. 346, p. 72, Laws 1877, made provision for a like homestead exemption, but required the person claiming the same to cause the word "homestead" to be entered of record on the margin of his recorded title to such lands to obtain the benefit of such exemption, and was silent as to when the same should or could be done. This provision with reference to the entering of the word "homestead" was dropped from the compilation of 1881, and in lieu thereof was added the following clause, viz.: "Such homestead may be selected at any time before sale." Sec. 342. Appellant contends that § 346, Laws 1877, aforesaid, is in force in this particular, and as the defendant did not cause the word "homestead" to be so entered of record, he was not entitled to any homestead exemption. But, without going into any discussion of this subject, we are of the opinion that such provision was repealed by the 1881 Code. See §§ 762, 3319, 3320 and 3325; also *Graetz v. McKenzie*, 3 Wash. 194 (28 Pac. 331); *Marston v. Humes*, 3 Wash. 267 (28 Pac. 520).

Sec. 484, Code Proc., which was § 345 of the 1881 Code, provides that a creditor may have a "homestead claimed under the provisions of this act" sold under execution upon making and filing an affidavit that it exceeds \$1,000 in value, and if it sells for more than that sum the excess applies upon the execution debt, and the \$1,000 exempted belongs to the homestead claimant. No sale could be had unless the sum bid exceeded \$1,000.

The statute is somewhat indefinite when it speaks of a homestead "claimed under the provisions of this act," no way being specified as to how the same shall be claimed, and no definite time fixed, only that it may be done at any time before sale. We do not think it was the intention to require the homestead claimant to attend the proposed sale

Jan. 1894.]

Opinion of the Court—SCOTT, J.

and make proclamation of his rights and claims in this regard, for he might have no knowledge of such proposed sale although legal notice thereof was given. Nor is he required to notify his creditors. Such exemptions being necessary to the welfare and protection of the family, and designed to prevent the absolute destruction of the home, are favored in law and ought not to be subject to defeat by reason of any such failure or omission. It is necessary that the homestead should be occupied as such, and this is probably the only way by which it can be selected under our present laws; certainly it is the most effectual way, and the defendant with his family was so occupying the land in question during all of said times, and appellant was bound to take notice of such occupancy when he purchased; in fact, he had actual notice. He is also chargeable with notice of the prior proceedings in said case by virtue of which the sale of said lands was attempted, and of the fact that no affidavit had been filed as required by § 484 aforesaid. Furthermore, that the same could not be sold except for a price in excess of \$1,000, and this for the undivided half interest of the defendant. Appellant's bid of \$1,600 was for the whole tract, and although there was no authority for selling the undivided half belonging to said children, the situation would not be altered.

It follows that such purported sale was void, and consequently the irregular proceedings by which a confirmation thereof was attempted could not lend any force to it, and were without effect.

Affirmed.

DUNBAR, C. J., and ANDERS and STILES, JJ., concur.

HOYT, J.—I think plaintiff showed good title to an undivided one-half of the land.

8	12
17	561
8	12
26	212
8	12
26	443

[No. 929. Decided January 9, 1894.]

THE STATE OF WASHINGTON, *Respondent*, v. U. A. GILE,
Appellant.

CRIMINAL LAW — SUBSTITUTION OF NEW INFORMATION — CHALLENGE TO JURORS — INFORMATION — ALLEGATIONS SHOWING INVOLUNTARY MANSLAUGHTER — DEATH RESULTING FROM SURGICAL OPERATION — EVIDENCE — REASONABLE DOUBT.

It is a matter within the discretion of the court to allow the prosecuting attorney to withdraw an information on file prior to the commencement of the trial, and file another charging the same offense.

It is not error to refuse a challenge for cause to a juror who states that he has read about the case in a newspaper, which created a kind of impression upon his mind which he expected would require a certain amount of evidence to remove, but that his mind would yield as readily to the evidence as if he had never heard anything whatever about the case.

A hypothetical opinion expressed by a juror prior to a trial, that if what he had read about the case was true the accused ought to be convicted on general principles, is not alone sufficient cause for granting a new trial.

An information which states, in substance, that the defendants unlawfully, willfully and feloniously inflicted a mortal wound, or wounds, upon the deceased, and does not aver that the killing of the deceased was willfully or voluntarily done, charges the crime of involuntary manslaughter.

Although an information charging manslaughter may not show that the accused bore the relation to the deceased of surgeon, and that death resulted from a surgical operation performed, evidence touching the character of the operation, the propriety of performing it, and the subsequent treatment of the deceased, is admissible.

Where it is shown by competent testimony that after deceased had lost all hope or expectation of recovery, and while under a solemn sense of impending death, he stated that he had been "butchered" by the doctors, the evidence is admissible as a dying declaration as to the cause of the declarant's death.

Where the court charges the jury that, "A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence. If, after considering all the evidence in the case, you can say that you have an abiding

Jan. 1894.] Opinion of the Court—ANDERS, J.

conviction of the truth of the charge, then you are satisfied beyond a reasonable doubt, and should convict; if you have not such a conviction, you should acquit," it is not error to refuse a request for a charge that "a reasonable doubt for a trial juror is such a doubt as a man of ordinary prudence, sensibility and decision, in determining an issue of like concern to himself as that before the jury to the defendant, would allow to have any influence whatever upon him, or make him pause or hesitate in arriving at his determination."

In an action for manslaughter against a surgeon for causing death by a surgical operation, the consent of the deceased to the operation is a good defense only where the operation is performed with due care and skill.

Appeal from Superior Court, Lewis County.

O. V. Linn, and Swasey & Lemley, for appellant.

A. E. Rice, Prosecuting Attorney, B. W. Coiner, S. C. Herren, and M. A. Root, for The State.

The opinion of the court was delivered by

ANDERS, J.—An information was filed in the superior court of Lewis county, by the prosecuting attorney in and for said county, purporting to charge the appellant, together with James D. Minkler and Catherine McCormick, with the crime of manslaughter in causing the death of one Alfred Wright. The appellant, at his own request, was tried separately, and a verdict of guilty was returned by the jury. A motion for a new trial was filed and overruled. A motion in arrest of judgment was then filed, which was likewise denied; whereupon the appellant was sentenced by the court to imprisonment in the state penitentiary for a period of four years.

Before the commencement of the trial the prosecuting attorney asked and obtained leave of the court to withdraw the information then filed, and to file a new information charging the same offense. This proceeding was objected to by the defendants, and the ruling of the court upon the objection is here assigned as error. It is not claimed that

the defendant was in any respect injured or prejudiced by the action of the court, nor is it claimed that the proceeding was unconstitutional, but the objection is urged solely upon the alleged ground that the court had no power to permit the filing of a new information, and that when the prosecuting attorney had once made and filed an information, he had exhausted the power conferred upon him by law.

Upon the facts as stated in appellant's brief, it is not necessary to enter into a discussion of the question whether or not a trial court has the power to permit an information to be amended after it has been filed with the clerk. That question, strictly speaking, is not raised by the ruling of the court now under consideration. The request to withdraw the information was virtually a request to quash it, or set it aside, and that the court had discretionary power to do on motion of the prosecuting attorney. 1 Archbold, Crim. Pr. & Pl. (Pomeroy's Notes), p. 318; Code Proc., § 1372.

Indeed, the appellant would have had no legal ground of complaint if a second information had been filed against him during the pendency of the first. *State v. Freidrich*, 4 Wash. 204 (29 Pac. 1055).

We think the court did not abuse the discretion vested in it by § 1301 of the Code in denying the challenge for cause interposed by the defendant to the juror Adams. The record discloses that upon the trial of the challenge the juror stated that he was not acquainted with the defendant, and knew nothing about the case except what he read in a newspaper; that he formed no opinion from what he had read as to the guilt or innocence of the defendant, and then had no such opinion, but that what he read in the newspaper created a kind of impression upon his mind which he "expected" would require a certain amount of evidence to remove. He further stated that as a juror he

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could entirely disregard this impression and render a verdict according to the evidence and the law as given by the court. He had heard no discussion of the merits of the case by any person or persons; and he stated, in response to a question propounded by the court, that his mind would yield as readily to the evidence as if he had never heard anything whatever about the case. Under this state of facts, the doctrine announced by this court in *Rose v. State*, 2 Wash. 310 (26 Pac. 264), is not applicable. See Code Proc., § 346. It is evident from the whole examination of this juror that any impression or opinion which he may have entertained as to the guilt or innocence of the defendant was too evanescent and unsubstantial to bias his mind or cloud his judgment.

It is claimed on behalf of the appellant that the juror Whistler, who was not challenged, was, in fact, not impartial, and had, previously to the trial, expressed an opinion indicative of prejudice against the appellant, and that for this reason the court erred in overruling appellant's motion for a new trial. Upon his examination as to his competency to serve as a juror in this case, the said Whistler stated, in effect, that he knew nothing about the case further than a statement which he saw in a newspaper called the *Winlock Pilot*, to the effect that the defendants had had a preliminary examination and were held for trial, that the article he read made no impression upon his mind, and that he had no bias or prejudice for or against the defendants, and had neither formed nor expressed any opinion as to their guilt or innocence. But, upon the hearing of the motion for a new trial, the appellant produced the affidavit of one Landrum, which was corroborated by Langhorne, in which it was stated that, on January 21, 1893, Whistler, in a conversation in his barber shop at Winlock, remarked, in substance, that from what he had read and heard about the case, he believed they (meaning

the defendants) would be convicted, and that if what he had read was true they ought to be convicted on general principles, and he believed they would be convicted. Whistler, in a counter affidavit filed on behalf of the state, vigorously denied making any such remarks, and asserted that, prior to the trial, he took no interest whatever in the case and had no conversation with any one as to its merits, and had at the time of the trial formed no opinion as to the guilt or innocence of the defendant. It appears from the affidavit of Whistler that, at the time mentioned by Landrum and Langhorne, the latter were not the only persons present in his barber shop, and it is therefore possible that both Landrum and Langhorne were mistaken as to the person who made the declarations attributed to Whistler. But even if he did make use of the expressions set out in the affidavit, it does not necessarily follow therefrom that he was not a fair and impartial juror in the trial of the case. The opinion expressed was purely hypothetical and would not alone have been sufficient cause for granting a new trial. It is not every opinion, formed or expressed, that will disqualify a juror, but only such as prevent the giving of a fair trial and impartial verdict.

No demurrer was interposed to the information in the court below, nor is it claimed here that the facts therein stated do not constitute a crime; but it is contended, with much earnestness and ability by the learned counsel for the appellant, that it charges the defendants with voluntary manslaughter, whereas the proof shows that, if any crime was committed at all, it was that of involuntary manslaughter, and that, therefore, the information was not sustained by the evidence, and consequently the court erred in refusing to grant the motion in arrest of judgment, which was based upon that ground.

That a party informed against for voluntary manslaughter cannot, under § 7 of our Penal Code, be con-

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victed of involuntary manslaughter, seems to be conceded by counsel for the respondent, but they insist that the information in this case in fact charges the defendants with the commission of involuntary, and not voluntary, manslaughter. In order to determine which of these views is the correct one, it becomes necessary to determine what facts are set out in the information, the material portion of which, so far as the question now under consideration is concerned, is as follows:

“Comes now A. E. Rice, prosecuting attorney for the said Lewis county, State of Washington, the said superior court of the said Lewis county being in session, and the grand jury for said county not being in session. And now here said prosecuting attorney gives the said superior court to understand, and to be informed by this information, that the above named James D. Minkler, U. A. Gile and Catherine McCormick are guilty of the crime of manslaughter, committed as follows: The said James D. Minkler, U. A. Gile and Catherine McCormick, in said Lewis county, State of Washington, to wit, the fifth day of December, A. D. 1892, with force and arms, in and upon the body of one Alfred Wright, then and there being, unlawfully and feloniously did make an assault, and that they, the said James D. Minkler, U. A. Gile and Catherine McCormick, did then and there, unlawfully, feloniously and forcibly, with a certain knife and saw and other edged instruments, which they, the said James D. Minkler, U. A. Gile and Catherine McCormick, in their hands then and there held, in and upon the right hip of him, the said Alfred Wright, then and there unlawfully, willfully and feloniously, did strike and thrust; giving to the said Alfred Wright then and there and thereby, with the said knife, saw and other edged instruments, in and upon the said right hip of the said Alfred Wright, a mortal wound, of the breadth of four inches and of a depth of six inches; severing and mutilating the femur bone of the right leg of him, the said Alfred Wright; and that the said James D. Minkler, U. A. Gile and Catherine McCormick did then and there continuously, from said fifth day of December,

A. D. 1892, until the thirteenth day of December, A. D. 1892, unlawfully, willfully and feloniously, and with force and arms, place and keep the body of him, the said Alfred Wright, in and upon a filthy, offensive and unclean bed, in a filthy room filled with vile, unhealthy and poisonous atmosphere; and the said James D. Minkler, U. A. Gile and Catherine McCormick did then and there continuously, from the said fifth day of December, A. D. 1892, until the thirteenth day of December, A. D. 1892, unlawfully, willfully and feloniously, keep said wound upon the said right hip of him, the said Alfred Wright, in an unclean and filthy condition; then and there giving to the said Alfred Wright, by then and there unlawfully, willfully, feloniously and maliciously striking and thrusting with the knife, saw and other edged instruments aforesaid, in and upon the said right hip of him, the said Alfred Wright, and giving him, the said Alfred Wright, a mortal wound four inches in breadth and of the depth of six inches, and severing and mutilating the femur bone of the right leg of him, the said Alfred Wright, as aforesaid, and by then and there unlawfully, willfully and feloniously placing and keeping the body of him, the said Alfred Wright, in and upon a filthy, offensive and unclean bed in a filthy room, filled with vile, unhealthy and poisonous atmosphere as aforesaid, and by then and there unlawfully, willfully and feloniously keeping said wound upon the right hip of him, the said Alfred Wright, in an unclean and filthy condition, as aforesaid, several mortal injuries in and upon the right hip and other parts of the body and the lungs, stomach and blood of him, the said Alfred Wright, of which said mortal injuries the said Alfred Wright, from the said fifth day of December, A. D. 1892, to the twenty-third day of December, A. D. 1892, in the county and state aforesaid, did languish, and languishing did live; on which twenty third day of December, A. D. 1892, at the county and state aforesaid, of the mortal wounds and injuries aforesaid, the said Alfred Wright aforesaid died.

“And so the prosecuting attorney aforesaid does say and give the superior court aforesaid to understand that the said James D. Minkler, U. A. Gile and Catherine McCormick, at the said Lewis county and State of Washing-

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ton, in the manner, at the time and by the means aforesaid, him, the said Alfred Wright, unlawfully, willfully and feloniously did kill and slay, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Washington.”

It will be perceived that it is nowhere averred in this information that the accused killed the deceased involuntarily, but in the commission of some unlawful act; but such averments, though highly proper, are not absolutely necessary in order to constitute a charge of involuntary manslaughter, if, from the facts alleged, the inference arises that death resulted involuntarily from the commission of an unlawful act on the part of the accused. *Brown v. State*, 110 Ind. 486 (11 N. E. 447).

Neither is it alleged in the information that the accused voluntarily killed the deceased, unless the language used in the closing portion thereof, commencing with the words “and so,” amounts to such an averment. This is admitted by counsel for the appellant, but they contend that the words referred to clearly show that the crime of voluntary manslaughter was intended to be charged. We have heretofore had occasion to determine the effect of similar language in indictments, and it may be said to be the doctrine of this court that the allegations in question are but the statement of a conclusion drawn by the accuser from the facts stated in the body of the indictment or information, and constitute no essential part thereof (*Leonard v. Territory*, 2 Wash. T. 393, 7 Pac. 872; *Blanton v. State*, 1 Wash. 265, 24 Pac. 439), and might properly be omitted altogether. While the information does state, in substance, that the defendants unlawfully, willfully and feloniously inflicted a mortal wound, or wounds, upon the deceased, it fails, as we have said, to state as a fact, that the killing of the deceased was willfully or voluntarily done. We, therefore, conclude that it states facts sufficient to constitute the

crime of involuntary manslaughter, and that there was no error committed by the court in refusing to arrest the judgment.

The evidence given upon the trial discloses the fact that the appellant is a physician and surgeon, and that the wounds mentioned in the information were made in the performance of a surgical operation. But the information is silent as to the relations existing between appellant and the deceased, and hence it is argued that it is defective in that regard and insufficient to admit evidence of the manner in which the operation was performed.

It is an elementary principle in criminal pleading that every special fact which constitutes an essential part of the offense charged must be fully set forth in the indictment or information. Whart. Crim. Pl. & Pr., § 151. And we would be inclined to adopt the view of counsel if we were satisfied that the fact that the defendant in this instance was a surgeon was such an essential ingredient of the crime charged that the omission to state it in the information rendered it defective or caused any injury to the defendant, or deprived him of any right whatever. But we are not so satisfied, and do not think that appellant was prejudiced by the want of such an averment. Nor is this information without precedent in the particular now under discussion. In the late case of *Commonwealth v. Pierce*, 138 Mass. 165, the defendant, who was a practicing physician, was indicted for manslaughter in causing the death of a patient, but it was nowhere alleged in the indictment that the relation of physician and patient existed. The capacity in which the defendant acted was, in that case as in this, only disclosed by the proofs. It was a strongly contested question at the trial of this case, whether the appellant did not in fact perform a highly dangerous and unnecessary surgical operation upon the deceased, without his consent or knowledge; and cogent testimony was produced before the jury for the

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purpose of proving that the appellant was only employed to reduce a supposed dislocation of the head of the femur by simply pulling the bone into its proper place. While the defendant himself testified that he did nothing but what he was called and requested to do by the deceased, he also testified that the first thing he did, after rendering the old gentleman, Mr. Wright, insensible by means of anæsthetics, was to put deceased's right leg over his (appellant's) shoulder and "surge" upon it until he found it impossible, or impracticable, to break up the ankylosis that existed between the dorsal part of the ilium and the head of the femur.

This testimony, which was corroborated by other witnesses, tended to show to the jury that it might have been the understanding that the deceased was not to submit himself to a more dangerous operation with knife and saw. Failing to set the joint by pulling the leg as above stated, the appellant then made a long and deep incision in the hip of the deceased, and, with saw and forceps, removed a portion of the neck of the femur, for the purpose, as he says, of straightening the limb. The ankylosis, however, was not broken up, and, in fact, it was revealed upon a *post mortem* examination that the hip joint had been only partially dislocated, if at all, as the head of the femur was still in the acetabulum and firmly attached to the side thereof. This operation consumed considerable time—about an hour according to the testimony—and the deceased, who was an old and rather feeble man, lingered some two weeks thereafter, and then died. The defendant undertook to justify the cutting on the ground that it was necessary in order to remove pus which had gathered there to such an extent as to endanger the patient's life, and the removal of a portion of the femur on the ground that it was in a condition styled necrosis, or, in other words, decayed.

A great deal of the testimony touching the character of

the operation, the propriety of performing it at all, and the subsequent treatment of deceased, was objected to on the ground that it was irrelevant and immaterial and not sustained by the information. It is not practicable to set forth all of this testimony, and we will therefore simply say that, under the circumstances of this case, we are of the opinion that it was competent and admissible.

We think the dying declarations of the deceased were properly admitted in evidence. It was shown by competent testimony that after he had lost all hope or expectation of recovery, and while under a solemn sense of impending death, he made the statement, among others, that he had been "butchered" by the doctors and the old woman, Mrs. McCormick. The objection is, that the declaration was but the expression of an opinion and not the statement of a fact as to the cause of the declarant's death; but we are inclined to view it otherwise. The word butchered simply means killed in an unusual, cruel or wanton manner, and no more expresses an opinion than the word killed when used without qualification. The motion to strike out this portion of the testimony was properly denied.

At the close of the trial, counsel for the defendant asked the court to give numerous instructions to the jury, some of which were refused and exception taken, and the ruling of the court thereon is alleged as error. Many of these objections, however, were not urged upon the argument in this court, and therefore will not be discussed. But some of them were earnestly argued and pressed upon our attention, and will now be specifically considered.

Upon the subject of reasonable doubt, the defendant asked, and the court refused, the following instruction:

"No. 14. A reasonable doubt is never an absolute but always a relative question. A reasonable doubt for a trial juror is such a doubt as a man of ordinary prudence, sensibility and decision, in determining an issue of like concern

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to himself as that before the jury to the defendant, would allow to have any influence whatever upon him, or make him pause or hesitate in arriving at his determination.”

This instruction seems to be couched in the identical language of Chief Justice GREENE in defining a reasonable doubt, in the opinion delivered by him in the case of *Leonard v. Territory*, 2 Wash. T. 381 (7 Pac. 872). But, with due deference to the learning and ability of that eminent jurist and his concurring associates, we are constrained to say that we are not willing to accept that as the settled definition of this court to the exclusion of all other definitions that may be given. Any instruction on the question of reasonable doubt which tends to explain the meaning of the term, without confusing the minds of the jury, ought not, in our opinion, to be deemed erroneous. In fact, as was well said by the supreme court of the United States in *Miles v. United States*, 103 U. S. 304, “attempts to explain the term reasonable doubt do not usually result in making it any clearer to the minds of the jury.” And that being so, we apprehend it would be better in most cases not to undertake to explain it at all. In this instance the trial judge charged the jury as follows:

“A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence. If, after considering all the evidence in this case, you can say that you have an abiding conviction of the truth of the charge, then you are satisfied beyond a reasonable doubt, and should convict; if you have not such a conviction, you should acquit.”

This charge having been given to the jury, we fail to see wherein the defendant was injured by the court's refusing to give the instruction requested by him. The jury were no doubt as much enlightened by the instruction given as they would have been by the giving of the one refused. The charge given was at least as comprehensive as that given to the jury by Mr. Justice FIELD in *United*

States v. Knowles, 4 Sawy. 521, wherein he defined a reasonable doubt as a "doubt founded upon a consideration of all the circumstances and evidence, and not a doubt resting upon mere conjecture or speculation."

It is also contended that instructions numbered 8, 11 and 29 should have been given as requested. They are as follows:

"No. 8. If you fail to find from the evidence, beyond a reasonable doubt, that the deceased, Alfred Wright, died from the wound made by defendant in the hip, and you find that the deceased consented to the performance of the operation which the evidence shows was performed, then you must acquit the defendant of even assault and battery."

"No. 11. That in showing the cause of the death, the evidence must be so strong that it will not admit of a reasonable doubt, and you can indulge in no presumptions in aid of the evidence in order to arrive at the conclusion that the wound in deceased's hip and the subsequent treatment of him caused his death."

"No. 29. If you find from the evidence that the defendant performed the operation without the consent of the deceased, but do not find beyond a reasonable doubt that the wound was the cause of his death, then you may find the defendant guilty of manslaughter, assault and battery."

A mere glance at the instruction last above set forth will show that the court committed no error in refusing to give it to the jury without modification. If the operation was performed without the consent of the deceased, and did not result in his death, it is impossible to see how the defendant could be lawfully convicted of the crime of manslaughter. But it is argued that if this instruction was wrong, then instruction No. 8 must be correct and should not have been refused. But this instruction is also wrong, for the reason that it assumes that consent to a surgical operation in dangerous cases is a good defense, though the effect be fatal, irrespective of the manner in which it may be performed, which cannot, in our judgment, be the law.

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Consent is only a good defense, in such cases, where the operation is performed with due care and skill. Desty, *Crim. Law*, 33*a*; Kerr on Homicide, § 26. It is no excuse for recklessness, or even want of usual skill. See 1 Whart. *Crim. Law*, § 362; see also *Commonwealth v. Pierce*, *supra*.

The eleventh instruction was misleading, and for that reason alone was properly refused. While intelligible to the mind of a lawyer, it would most likely have been entirely misunderstood by the jury. From a careful consideration of all the instructions given, we feel satisfied that the law applicable to the facts in this case was fairly and fully presented to the jury, and that was all the defendant had a right to claim.

The further point is made in appellant's brief that the cause of death was not shown beyond a reasonable doubt. A number of expert witnesses gave opinions upon that question. Some of them were positive that deceased died from the effect of the surgical operation, while others seemed to think that death might have resulted from some other cause. The condition of deceased's hip at the time of the operation was shown to have been better than it had been for months previously. He was not shown to be suffering from any disease; but it appears that after the operation was performed he never rallied, but on the contrary steadily declined until he died. With all the circumstances and evidence before them the jury found adversely to appellant's contention, and we are unable to say that their conclusion is not supported by the evidence.

Some other objections are raised by the appellant, but as we do not think they are tenable, we need not further extend this opinion by discussing them.

The judgment of the lower court is affirmed.

DUNBAR, C. J., and STILES, HOYT and SCOTT, JJ., concur.

[No. 959. Decided January 9, 1894.]

ALFRED LAFOND, *Respondent*, v. JAMES H. SMITH, *Appellant*.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Where a personal judgment has been obtained against defendant in an action to foreclose a livery stable keeper's lien, defendant is entitled to a new trial upon an application showing that plaintiff had written him a letter the absence of which at the trial was fully explained, notifying him that he would resort to his lien upon the horses for their keep, upon which defendant had relied; and that the plaintiff, instead of pursuing that remedy, waited until the bill against the horses had greatly increased, and then sought to hold the defendant for its payment.

Appeal from Superior Court, Skagit County.

Sinclair & Smith, for appellant.

J. C. Waugh, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—The record in this case is exceedingly meager, and the special findings of fact by the jury are somewhat conflicting. So far as we are able to ascertain from the record, there is no merit in any of the allegations of error assigned by the appellant, except the error of the court in not granting a new trial on the ground of newly discovered evidence.

It seems to us that the letter, upon which the application for a new trial was made, shows pretty conclusively that the plaintiff had elected to seek his remedy against the horses, and that the appellant, after receiving the letter, had a right to presume that the respondent would take such action as he informed him in the letter that he would. He would not, therefore, be bound for any personal judgment. Instead of pursuing that remedy, however, respondent

waited until the bill against the horses had become somewhat enormous and then sought to hold the appellant for its payment personally, after having notified him that he would resort to his lien upon the horses. We think if this letter had been introduced in testimony the probabilities are that the verdict would have been different; and as the affidavit of appellant seems to us to fully explain its absence at the trial, we think the court erred in not granting the motion for a new trial on this ground.

The judgment will, therefore, be reversed and the cause remanded with instructions to grant a new trial.

STILES, SCOTT, ANDERS and HOYT, JJ., concur.

[No. 1001. Decided January 9, 1894.]

WILLIAM A. BELL, *Respondent*, v. THE WASHINGTON
CEDAR SHINGLE COMPANY, *Appellant*.

MASTER AND SERVANT—DEFECTIVE APPLIANCES—ALTERATIONS
SUBSEQUENT TO INJURY—EVIDENCE—INSTRUCTIONS—EXCEPTIONS.

In an action to recover for injuries received on account of the negligence of the master in providing imperfect machinery and appliances, evidence is incompetent for the purpose of showing that changes had been made in such machinery after the injury to plaintiff.

In such a case, where defendant's witness has testified that the machinery in use at the time the accident occurred was properly constructed and in good condition, it is not proper cross examination to question him as to changes made subsequent to the accident.

In such a case, where testimony as to alterations has been admitted, it is error to refuse defendant's request for an instruction that the fact of such alterations "after the accident in question is not a matter from which you are at liberty to infer that it was out of repair, imperfect or unsafe at the time the accident occurred."

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An exception to the refusal of the court to give requested instructions is sufficient when in the following form: "The court refused to give instructions requested by the defendant numbered 1, 3, 4, 6, 9 and 10, to the refusal of the court to give each of said instructions number 1, 3, 4, 6, 9 and 10, the defendant then and there duly excepted, and exceptions allowed by the court."

Appeal from Superior Court, Whatcom County.

George Rice, and G. V. Alexander, for appellant.

E. E. Hardin, and Bruce & Brown, for respondent.

The opinion of the court was delivered by

HOYT, J.—This action was brought to recover for personal injuries alleged to have been occasioned by the negligence of the defendant. The negligence charged was, that the defendant had provided imperfect machinery and appliances, and had put plaintiff to work in connection therewith without his being in any manner informed of the nature and use of the same. Plaintiff was allowed to show that, after the accident, changes had been made in such machinery and appliances. Proper exceptions were taken by the defendant to the introduction of such testimony, and the ruling of the court thereon is properly presented here for our consideration.

That it is not competent for the plaintiff in actions of this kind to show that such changes have been made is well established by the authorities in this country. That such is the fact will sufficiently appear from a quotation from a single case. The supreme court of the United States, in the case of *Columbia, etc., R. R. Co. v. Hawthorne*, 144 U. S. 292 (12 Sup. Ct. 591), in so holding made use of the following language:

"Upon this question there has been some difference of opinion in the courts of the several states. But it is now settled, upon much consideration, by the decisions of the highest courts of most of the states in which the question

has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant. *Morse v. Minneapolis & St. Louis Railway*, 30 Minn. 465; *Corcoran v. Peekskill*, 108 N. Y. 151; *Nalley v. Hartford Carpet Co.*, 51 Conn. 524; *Ely v. St. Louis, etc., Railway*, 77 Mo. 34; *Missouri Pacific Railway v. Hennessey*, 75 Tex. 155; *Terre Haute & Indianapolis Railroad v. Clem*, 123 Ind. 15; *Hodges v. Percival*, 132 Ill. 53; *Lombar v. East Tawas*, 86 Mich. 14; *Shinners v. Proprietors of Locks & Canals*, 154 Mass. 168.

"As was pointed out by the court in the last case, the decision in *Readman v. Conway*, 126 Mass. 374, 377, cited by this plaintiff, has no bearing upon this question, but simply held that in an action for injuries from a defect in a platform, brought against the owners of the land, who defended on the ground that the duty of keeping the platform in repair belonged to their tenants and not to themselves, the defendant's acts in making general repairs of the platform after the accident, 'were in the nature of admissions that it was their duty to keep the platform in repair, and were therefore competent.'

"The only states, so far as we are informed, in which subsequent changes are held to be evidence of prior negligence, are Pennsylvania and Kansas, the decisions in which are supported by no satisfactory reasons. *McKee v. Bidwell*, 74 Pa. St. 218, 225, and cases cited; *St. Louis & San Francisco Railway v. Weaver*, 35 Kan. 412."

That such is the rule established by the courts of most of the states is well settled. Respondent makes little contention against such rule, but claims that it is not applicable to the facts of this case. The testimony to which exception was taken by the defendant was not introduced as a part of the plaintiff's case. It was brought out upon the cross examination of defendant's witnesses. Such

being the fact, he contends that it was competent for the reason that it had a tendency to discredit their testimony in chief in which they had testified that the machinery in use at the time the accident occurred was, in their opinion, properly constructed and in good condition. In our opinion such cross examination should not have been allowed. If the fact that changes had been made cannot be introduced to show negligence on the part of the defendant for the reason that it has no legal bearing upon the question, we are unable to see how such fact can in any manner affect the testimony of a witness who has testified as to the character of the machinery at the time of the accident. If the alterations had no tendency whatever to show that the machinery was unsafe, it is impossible to see how such fact could affect the testimony of a witness who has sworn to the condition of such machinery.

The respondent alleges another reason why such testimony was admissible, and that was that there had been, at the suggestion of the defendant, a view of the premises by the jury, on account of which he was entitled to show that the condition of the machinery at the time of the view was different from that at the time of the accident. There is force in the position of the respondent, and testimony for that purpose might have been admissible. But, as it was only admissible for that purpose, and that not arising in the ordinary course of the trial, the court should have excluded it until the purpose for which it was admitted had been so explained as to be fully understood by the jury. The more orderly way would have been for the plaintiff to have introduced it as affirmative proof in rebuttal, and not by way of cross examination of defendant's witnesses. It was not admissible as cross examination of anything which the witnesses had testified to, and for that reason should have been excluded as offered.

At the conclusion of the testimony the defendant pre-

sented certain requests for instructions. One of them was in the following language:

“You are instructed that the fact that the defendant covered or boxed the set screws and made changes in the machinery for hoisting logs after the accident in question is not a matter from which you are at liberty to infer that it was out of repair, imperfect or unsafe at the time the accident occurred.”

The court refused to give this instruction, and such refusal is alleged as error. In view of the action of the court in admitting the testimony as to alterations, the defendant was clearly entitled to this instruction, and the failure to give it constituted reversible error.

The refusal to give one other instruction is assigned as error, but we think that the request for such instruction was properly refused. It required the court to assume that to be a fact as to which there was some contradiction in the testimony.

Respondent contends that there was no sufficient exception to the refusal to give the instructions requested to justify the court in examining into this question. The language of the exception, as shown by the statement of facts, is as follows:

“The court refused to give instructions requested by the defendant number 1, 3, 4, 6, 9 and 10, to the refusal of the court to give each of said instructions number 1, 3, 4, 6, 9 and 10, the defendant then and there duly excepted, and exceptions allowed by the court.”

We think it was sufficient.

Respondent presents the further point that, notwithstanding the erroneous rulings on the part of the court as above stated, the case should not be reversed, for the reason that the defendant could not have been injured thereby, as the jury found specially that the sending of the plaintiff, who was an inexperienced person, to do the work in which he was engaged was the cause of the injury. If we could

construe the special findings of the jury as the respondent does, we might agree with his contention, but we are unable to do so. The jury, after finding as a fact that the injury was caused by the negligence of the defendant, found that such negligence consisted in "an incomplete construction of appliances, and exposed set screws on the collar of the shaft; also in the sending of an inexperienced person to manipulate the same;" and when most strongly construed against the defendant would only establish the fact that in the opinion of the jury the inexperience of the plaintiff contributed to the injury. It is not made at all to appear therefrom that the accident would have occurred, however inexperienced the plaintiff might have been, if the machinery had not been incomplete.

It follows that it does not affirmatively appear that if the jury had found such machinery to be complete and proper they would have rendered the general verdict that they did. The judgment must be reversed, and the cause remanded for a new trial.

STILES and ANDERS, JJ., concur.

DUNBAR, C. J., and SCOTT, J., dissent.

[No. 1027. Decided January 9, 1894.]

FRANK L. JOHNSON *et al.*, Respondents, v. J. C. LIGHTHOUSE *et al.*, Appellants.

APPEAL—NOTICE—PREMATURE JUDGMENT.

An appeal will be dismissed when one of the parties to the action has not been served with notice of the appeal.

An appeal will not lie from a judgment which fails to dispose of all the defendants in the action, either by dismissal or by an affirmative judgment.

Appeal from Superior Court, Whatcom County.

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430	206

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Opinion of the Court—STILES, J.

Callvert, Neterer & Cade, for appellants.*Bruce & Brown*, for respondents.

The opinion of the court was delivered by

STILES, J.—Respondents move to dismiss the appeal because of appellants' failure to serve one of the defendants in the action, the Pacific Loan, Trust & Investment Company, which appeared in the action, with notice of the appeal. The point is well taken, and must be sustained. Code Proc., § 1406; *National Bank v. Central Hotel Co.*, 4 Wash. 642 (30 Pac. 671); *Traders' Bank v. Bokien*, 5 Wash. 777 (32 Pac. 744).

There is also another ground of dismissal which we find from the record, and which existed when the appeal was taken. This was an action to foreclose a material man's lien upon property of which the appellant Lighthouse and his wife were the owners. The Pacific Loan, Trust & Investment Company and a number of other parties were made defendants, under an allegation in the complaint that they were either contractors or parties who claimed to have or hold some interest in the property adverse to the claim and interests of the plaintiffs, but junior and inferior to the plaintiffs' claim. Whether all of these defendants were served with process or not does not appear; but, in addition to the principal defendants and the Pacific Loan, Trust & Investment Company, three other defendants appeared.

The Pacific Loan, Trust & Investment Company filed a demurrer to the complaint, which was never disposed of; the other three defendants filed answers; all of the defendants, except the one mentioned, were served with notice of the appeal, and they all, by their attorneys, admitted service and were present and took part in the settlement of the statement of facts. No default or other conclusion of the rights of any of these defendants, except Lighthouse

and wife, was entered, and, for aught that appears, they may still be litigating the claim of respondents against them.

The decree runs against the owners and contractors only, and leaves the other defendants without any adjudication whatever, and was therefore premature and partial only. No judgment purporting to be a final decree should have been entered until all the defendants were disposed of, either by dismissal or by an affirmative judgment of some kind.

From the general aspect of the case, and from statements of counsel, we gather that this was but one of a large number of lien claims filed by the several defendants, and that the other claimants were made defendants for the purpose of cutting them off from a participation in the proceeds of a sale. But each of these defendants commenced a similar foreclosure action for himself, instead of answering in this case, and when all of the cases were before the court it consolidated them for the purpose of trial. In such a case it was proper enough to enter a separate interlocutory decree establishing the lien of each claimant establishing a right thereto, but there should be but one final decree ordering a sale and application of the proceeds. There would be nothing in this course preventing a separate appeal by any claimant, owner or contractor from so much of the decree as affected him, upon so much of the record as was pertinent; but the time for appeal and settlement of statement would not begin to run until the final decree was entered, the costs of the foreclosure would be greatly lessened, and inevitable confusion would be avoided.

Upon both grounds specified the appeal is, therefore, dismissed.

DUNBAR, C. J., and HOYT, SCOTT and ANDERS, JJ., concur.

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Opinion of the Court—STILES, J.

[No. 1041. Decided January 9, 1894.]

*In the Matter of the Estate of John T. Wilbur, deceased:*SARAH J. WILBUR, *Appellant*, v. C. E. BINGHAM, *Respondent*.

8	35
14	244
8	35
122	117
22	120
8	35
83	174

MARRIAGE WITH INDIAN — VALIDITY — ADMINISTRATION OF DECEDENT'S ESTATE — JURISDICTION.

The marriage of a white man to a Swinomish Indian woman, although contracted on the reservation of that tribe and pursuant to its customs, was void if celebrated while the territorial law of 1866 forbidding marriages between Indians and white persons was in force, as, under the organic act of this territory and the treaty with said tribe, such reservation was left within and a part of the territory, for all legislative and judicial purposes not affecting the personal rights and the lands and other property of the Indians.

The fact that the law forbidding a white person to marry an Indian was repealed within a short time after the celebration of such forbidden marriage, and that cohabitation was continued subsequent to such repeal, would not constitute a marriage.

Where the court acquires jurisdiction of a decedent's estate through a petition for the appointment of an administrator, which it denies, the court has power to proceed regularly to final distribution, although the widow of the decedent may protest against any administration.

Appeal from Superior Court, Skagit County.

Million & Houser, for appellant.

Sinclair & Smith, for respondent.

The opinion of the court was delivered by

STILES, J.—The disposition of this appeal depends upon whether there was a marriage between the deceased, John T. Wilbur, and a Swinomish Indian woman, “Kitty,” who, with her sons by said John T., proposes the respondent as administrator of the estate. Appellant claims administration for herself, if any be granted, as the only lawful wife of the deceased.

In 1867 the Swinomish tribe were treaty Indians, residing upon the reservation set apart for them on Fidalgo Island, Skagit county, by a treaty ratified by the United States senate and proclaimed by the president in 1859. Abbott's Real Prop. Stat., p. 1123. Kitty, then about thirteen years of age, lived with her parents on the reservation, and Wilbur, who had been a resident of the territory for some time, lived on government land which he had taken up at a few miles distance therefrom. At that time there were almost no white women in the country, and many of the men had Indian women living with them. Wilbur became desirous of having the company of a "klootchman," and selected Kitty for that purpose, and made such arrangements with her father and the authorities of the tribe, that she left the reservation and went to his place, and there lived with him for about nine years. She then left him, probably at his suggestion, and returned to the reservation, and he soon after married the appellant.

It is not contended that the relations which existed between this man and woman were preceded by any statutory marriage, or that they were attended by any such circumstances as would have amounted to a common law marriage had such an institution been recognized here. They lived together and had children born to them, and that was all. But it is very strenuously urged, and the court below so found, that there was a binding marriage ceremony between them upon the reservation, according to the customs of the Swinomish tribe, and without entering into details, which amounted to little or nothing beyond the payment of a certain sum of money to the girl's father and his directing her to go with the white man, we think it may be conceded that all of the requirements necessary to constitute a valid Swinomish marriage were complied with, and that in the eye of the Swinomish law these two persons would have been considered man and wife. Had they both

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Opinion of the Court—STILES, J.

been Indians, such would undoubtedly have been the case, and the general holdings of the courts would have recognized the relation. *Kobogum v. Jackson Iron Co.*, 76 Mich. 498 (43 N. W. 602).

Marriages of this kind have been upheld when they existed between a white man and an Indian woman. *Johnson v. Johnson's Adm'r*, 30 Mo. 72 (see notes in 77 Am. Dec. 606); *Wall v. Williams*, 11 Ala. 839. Though the contrary has been as stoutly maintained. *Roche v. Washington*, 19 Ind. 53; *State v. Ta-cha-na-tah*, 64 N. C. 614; *Dupre v. Executor of Boulard*, 10 La. An. 411.

The general rule is that the *lex loci contractus* is controlling, in adjudications involving the validity of marriages (*True v. Ranney*, 21 N. H. 52; Story, Conf. Laws, § 113), though this doctrine has an important exception, which is involved in the case before us. Appellant claims that inasmuch as, at the time of the alleged marriage, there was in this territory a statute prohibiting a marriage between a white person and an Indian (Acts 1866, p. 81), even considering the reservation as a foreign jurisdiction, the marriage was void, because Wilbur thereby committed a fraud upon the law of his domicile, which was the territory. Where a marriage is prohibited, either by the statute or by those rules of morality and decency which make it against the natural law of civilized nations for two persons to marry, as incestuous or polygamous marriages, it is in vain for them to go beyond their domicile, to engage in a contract of marriage, for the purpose of avoiding the prohibition. Their contract will be held void upon their return. *Kinney's Case*, 30 Grat. 858; *State v. Kennedy*, 76 N. C. 251; *State v. Bell*, 7 Baxt. 10; *Pennegar v. State*, 87 Tenn. 244 (10 S. W. 305); Whart. Conf. Laws, § 181; *Brook v. Brook*, 9 H. L. Cas. 223. In Massachusetts the contrary was held, in *Medway v. Needham*, 16 Mass. 157, and that case was followed there until a statute interfered.

See notes to same case, 8 Am. Dec. 133. In some courts a marriage contracted without the state, by a person under statutory disability, with another, whose domicile was in the foreign state, has been equally subjected to a declaration of invalidity. But this seems a harsh rule, as it might involve a perfectly innocent man or woman in unmerited confusion and disgrace; and the contrary was held in a very learned and conclusive opinion of Chief Justice GRAY in *Commonwealth v. Lane*, 113 Mass. 458. Respondent insists that this more lenient rule should be followed in the case of a marriage between a white person and an Indian upon a reservation; the *locus* being considered analogous to a foreign state, and the Indian custom the *lex loci*. *Morgan v. McGhee*, 5 Humph. 13, sustains the proposition, and *Johnson v. Johnson's Adm'r*, 30 Mo. 72, *Boyer v. Dively*, 58 Mo. 510, and *La Riviere v. La Riviere*, 77 Mo. 512, go further, and hold that although there may have been no reservation at the place where the marriage took place, if it occurred in what used to be termed "Indian country," it was sufficient, if the Indian customs were followed, although, under those customs, husband and wife could separate at will, and marry again. In none of the cases cited, however, does there appear any intimation that any law of the state was violated by the marriage of a white man with an Indian woman, and in Missouri the doctrine of common law marriages has always been recognized. *Cargile v. Wood*, 63 Mo. 501; *Dyer v. Brannock*, 66 Mo. 391. But there was a prohibition in our territorial statute of 1866, and the final question is whether it had any force within the Swinomish reservation, so as to render void any marriage between Wilbur and Kitty, however celebrated.

It has always been conceded that congress had the right, when a new territory was organized, to exclude from its jurisdiction any lands embraced within the territorial limits,

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for any reason which it saw fit. More frequently than in any other cases, this exclusion was provided for as to lands embraced in Indian reservations. But it has not been by any means universal that either the civil or the criminal laws of a territory have been without force within the boundaries of an Indian reservation; and whether they have had such force or not has depended upon the acts of congress concerning the territories and public lands, and the treaties with various tribes providing for reservations. In *Harkness v. Hyde*, 98 U. S. 476, it was held that process from a district court of Idaho could not be served within the Shoshone reservation, in that territory, because the act of congress of March 3, 1863, organizing the territory, provided that it should not embrace within its limits or jurisdiction any territory of an Indian tribe, where, by a treaty with such tribe, their reservation was not to be included within the territorial limits or jurisdiction of any state or territory without their consent, and because, five years later, a treaty was made with the Shoshone Indians, whereby it was agreed that no persons, except agents of the government, should be authorized to pass over, settle upon or reside in the territory reserved. The court said that this territory "was as much beyond the jurisdiction, legislative or judicial, of the government of Idaho, as if it had been set apart within the limits of another country, or of a foreign state." But in *Langford v. Monteith*, 102 U. S. 145, the court acknowledged having made a mistake in the former case, in finding the existence in the treaty of the clause mentioned, and held that where no such clause, or language equivalent to it, was found in a treaty with Idaho Indians, the lands held by them were a part of the territory, and subject to its jurisdiction, so that its process could run therein, although the Indians themselves might be exempt from such jurisdiction. In *United States v. McBratney*, 104 U. S. 621, held, that the United States

circuit court for the district of Colorado had no jurisdiction of a case of murder committed by one white man upon another within the Ute reservation, because the act of March 3, 1875, authorizing the admission of Colorado as a state, contained no exception of jurisdiction over the reservation, such as had been made in the treaty with the Indians, but that the state courts, alone, could try the accused for the offense. An examination of the organic act of Washington Territory shows only this in regard to Indians and their lands:

“*Provided*, That nothing in this act contained shall be construed to affect the authority of the government of the United States to make any regulations respecting the Indians of said territory, their lands, property or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never been passed.” 10 St. at Large, 172.

No act amending or enlarging this proviso came into operation until 1875, when Rev. St. U. S., § 1839, was made applicable to all the territories. In the mean time the treaty with the Swinomish Indians was made, taking effect April 11, 1859. This treaty ceded to the government all the land formerly inhabited by the tribes of Indians joining therein, on both sides of Puget Sound, from Vashon Island northward to British Columbia, and from the summit of the Cascade mountains to the divide between Hood's canal and Admiralty inlet, but reserved to them certain defined tracts, in these words, following the description:

“All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent; but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them.”

This language, both of the organic act and of the treaty,

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was wholly different from that concerning the Idaho or Colorado Indians, and under *Langford v. Monteith* and *United States v. McBratney*, *supra*, must be taken to have left the reservation within, and a part of, the territory, for all legislative and judicial purposes not affecting the personal rights and the lands and other property of the Indians. Whether these could have been controlled by territorial statutes, we do not pretend to decide. But it must be, it seems to us, by every rule of jurisdiction, that when Wilbur went upon the reservation, even if he went there with the full purpose of procuring Kitty to be his wife, the law of the territory met him there, in all its force, and prohibited him from making a legal marriage with her, under any forms or ceremonies whatever; and she, although an Indian and a mere child, was bound to know that the same prohibition attached to her. Therefore the only attempt to constitute a marriage between them was void, and the fact that the prohibiting statute was repealed a short time after they commenced to live together, viz., in 1868, made their case no better, since all that appears in the record concerning them subsequently is that they cohabited, and cohabitation did not constitute a marriage. *In re McLaughlin's Estate*, 4 Wash, 570 (30 Pac. 651).

The order of the superior court, granting letters of administration to respondent, must be reversed, and the matter remanded, with direction to grant letters to appellant, if she be still capacitated; otherwise, to some other suitable person, as provided by law. Appellant protests against any administration, but we regard this as one of the cases where such a proceeding is most fitting, since deceased may have left heirs who are entitled to share in his estate, or there may be creditors who are unpaid. The court acquired jurisdiction of the estate through respondent's petition, and should now proceed regularly to final distribution.

HOYT and SCOTT, JJ., concur.

DUNBAR, C. J., and ANDERS, J., not sitting.

[No. 1056. Decided January 9, 1894.]

THE STATE OF WASHINGTON, *Respondent*, v. J. H. ROSENER, *Appellant*.

CRIMINAL LAW—INFORMATIONS—VERIFICATION BEFORE DEPUTY CLERK—INSTRUCTIONS—BODILY INJURY—REASONABLE DOUBT.

When an information is verified before a deputy county clerk, the verification is sufficient whether the jurat is signed by the deputy clerk in his own name as deputy or in the name of his principal by himself as deputy.

Where the court in an instruction to the jury has correctly defined a deadly weapon as one likely to produce death or "great bodily injury," it is not error for the court later in the same instruction to refer to such deadly weapon as one likely to produce death or "an injury" upon the complaining witness, as the omission of the words "great bodily," in the second definition is not misleading to the jury nor contradictory of the first definition.

An instruction defining a reasonable doubt, which is possibly open to the objection that it recognizes the right of a jury to require less positive proof of facts in cases of minor importance than in those of a graver nature, is not prejudicial, when the instruction, taken as a whole, defines such doubt as one which would make a man of common prudence pause or hesitate to act thereon.

Appeal from Superior Court, Whatcom County.

Black & Leaming, for appellant.

W. C. Jones, Attorney General, *Thomas G. Newman*, Prosecuting Attorney, and *Albert S. Cole*, for The State.

The opinion of the court was delivered by

Hoyt, J.—The appeal in this case is from a judgment and sentence imposed upon the appellant upon a verdict of a jury finding him guilty of the crime of assault with a deadly weapon with intent to inflict upon the person of another a bodily injury where no considerable provocation appears.

Two reasons are assigned why the judgment and sentence

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should be reversed: *First*, On account of the insufficiency of the information; and, *second*, for error of the court in instructing the jury. The information is attacked upon two grounds: (1) There is no allegation of the existence of the facts required by the statute to authorize the prosecuting attorney to proceed by information. (2) It does not appear therefrom that it had been properly verified.

It is only necessary to say, as to the first point, that substantially the same question was decided by this court adversely to the contention of the appellant in the case of *State v. Anderson*, 5 Wash. 350 (31 Pac. 969). As to the proof of verification, it is contended that it is insufficient for the reason that the deputy clerk signed the jurat in the name of his principal by himself as deputy, instead of in his own name as such deputy.

This irregularity, if irregularity it was, was not sufficient to destroy the force of the jurat. In *State v. Devine*, 6 Wash. 587 (34 Pac. 154), an information was attacked on the ground that the deputy signed the jurat in his own name instead of that of his principal, and this court held such verification good, but from the discussion therein it will appear that while some of the courts have held that the deputy must sign the jurat in the name of his principal, and that to sign it in his own name would render it invalid, and others that the contrary practice was the correct one, the weight of authority was in favor of holding that the verification was good in whichever form the jurat was signed. So long as the officer before whom the person to be sworn actually appears is authorized to administer the oath; and the jurat, when reasonably construed, shows that he so appeared and was sworn by such officer, its particular form is immaterial.

Error is founded upon two instructions given to the jury. In one of them the court, in defining the term "deadly weapon," as used in the statute, first stated that a deadly

weapon is one likely to produce death or great bodily injury, and afterwards, in the same instruction, made use of the expression that such weapon was one likely to produce death or an injury upon the complaining witness. Appellant seems to rely with much confidence upon the fact that the omission of the words "great bodily" in the second reference to the nature of the weapon constituted reversible error. If there had been but one definition or description of a "deadly weapon" and such words had been omitted therefrom, such omission would have rendered the instruction so faulty that for the giving thereof there should be a reversal. But it is the duty of this court to look at the instructions as a whole, and as it appears therefrom that a definition entirely satisfactory to the defendant was first given, the fact that in referring again thereto such words were omitted could not, in our opinion, have misled the jury. The second definition does not in terms contradict the first one. A great bodily injury is still an injury; hence, the second attempted definition from which the words "great bodily" are omitted does not contradict the first one in which they were correctly used.

The other instruction to which exception is taken is that in which the court defined "a reasonable doubt." This instruction defined a reasonable doubt in substantially the language of the supreme court of the territory in the case of *Leonard v. Territory*, 2 Wash. T. 398 (7 Pac. 872), and it is contended on the part of the appellant that it is erroneous for the reason that it recognizes the right of a jury to require less positive proof of facts in cases of minor importance than in those of a graver nature. There may be some ground for a critical mind to draw some such conclusion from the language used, but when the definition is taken as a whole, and reasonably construed, it is at least as favorable to the defendant as he could ask. In fact, if the definition contained in such instruction is open to just

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criticism it is for the reason that it is too favorable to the defendant. When the court therein says that whenever the state of the proofs is such that every necessary fact is not made so evidently to appear that a man of common prudence would act thereon without any pause or hesitation whatever, the defendant should be acquitted, the state, and not the defendant, has reason to find fault with the instruction.

The judgment and sentence must be affirmed.

DUNBAR, C. J., and SCOTT, STILES and ANDERS, JJ., concur.

[No. 927. Decided January 15, 1894.]

D. O. PARMETER, *Appellant*, v. J. F. BOURNE *et al.*,
Respondents.

REMOVAL OF COUNTY SEAT—FRAUDULENT ELECTION—JURISDICTION OF COURT—RIGHT OF ACTION—INTEREST OF PRIVATE CITIZEN.

The superior court has no jurisdiction of the subject matter of an action which seeks to enjoin the removal of a county seat on the ground of fraud committed in the election therefor. (STILES and HOYT, JJ., dissent.)

A private citizen, although a taxpayer, has no such property interest in the location of a county seat as will give him a right of action to contest its removal. (STILES and HOYT, JJ., dissent.)

Appeal from Superior Court, Pacific County.

Fulton Bros., for appellant.

R. K. Boney, Crowley & Sullivan, and *Marion D. Egbert*, for respondents.

The opinion of the court was delivered by

DUNBAR, C. J.—At the general election held November 8, 1892, there was submitted, by order of the county com-

8	45
12	432
J12	440
14	606
J14	612
8	45
8	486
8	487
35*	586
35*	757
36*	482
8	45
16	280
8	46
39	142
39	143

missioners, to the electors of Pacific county, a proposition to remove the county seat of that county from the town of Oysterville, where it had been established for a number of years, to the town of South Bend, or to the town of Sealand. On November 18, 1892, the board of county commissioners canvassed the votes on that proposition, and ascertained from the poll books that 1,469 votes were cast on the proposition; that the town of South Bend received 984, the town of Sealand 376, and the town of Oysterville 109. The town of South Bend was thereupon declared to be the county seat of Pacific county, and an order was made requiring the public records and archives of the county to be moved to South Bend on or before the 4th day of February, 1893.

Appellant, a citizen and taxpayer of Oysterville, brought this action to set aside and vacate the order of the county commissioners of Pacific county declaring South Bend to be the county seat of Pacific county from and after the 4th day of February, 1893, and asked for an injunction to enjoin and restrain the defendants, and each of them, and their successors in office, from removing from the county building, or county offices, or from the town of Oysterville, any of the archives, public records, or any books whatever, or any property whatever, or any records whatever, to the town of South Bend, or elsewhere, and that they be restrained from attempting to remove any such records or archives, etc. The defendants demurred to the complaint, alleging, among other things, that the court had no jurisdiction of the subject matter of the action; that the complaint did not state facts sufficient to constitute a cause of action as to said defendants, or any of them; that plaintiff had no legal authority to sue in said action; and that the court had no jurisdiction of the persons of the defendants. The demurrer was sustained by the court on the ground that it had no jurisdiction of the

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subject matter of the action. The complaint alleges fraud in the counting of the votes by the judges of election, and in issuing fraudulent returns to the board of county commissioners of such election.

It is conceded that there is no provision made under the special law for the removal of county seats for a contest in case of illegal voting, unless there be a right of appeal from the action of the county commissioners in canvassing the votes. It is insisted by the appellant, that in this instance, if the law would warrant such an appeal, it would be absolutely ineffectual. With the view we take of the law it is not necessary to pass upon the question of the right of appeal in this character of a case. The statement of facts set up in the complaint appeals to us very strongly for relief, and shows an aggravated case of perverting the election laws, and thwarting the will of the voters, and had we the authority we would gladly place the parties upon the proof of their allegations. But, from an investigation of the law involving the origin, the history of, and the jurisdiction of courts of equity, we are forced to the conclusion that the court has no jurisdiction over this case; and, lamentable as it may be, that the voter is left remediless to have his vote counted for the place of his choice, it would be still more lamentable for a court, which is but a creature of the law, to assume jurisdiction which is not conferred upon it by law, or to usurp the functions of those tribunals in which the lawmaking power has reposed confidence, and upon which it has imposed discretionary powers over the subject matter.

A court of equity is not entirely a free lance which can be wielded independently of law or regulation. It is just as subservient to, and dependent on, the law so far as its jurisdiction is concerned as is a court of law. It is true that the rules governing the administration of law, and of enforcing and protecting rights under the law as applied

by courts of equity, are more pliable and adaptive than are the rules governing courts of law. The object of the establishment of courts of equity was to escape the rigidity of the rules governing cases of law, and to confer more discretionary powers upon the chancellor, thereby making the administration of the law more flexible and more effective for the elicitation of truth; and these flexible principles, or rules, which characterize the proceedings in equity, are usually applicable to the investigation of cases where fraud is involved, and for that reason such cases are assigned to the equity jurisdiction.

For this reason loose expressions are sometimes indulged in, to the effect that "it is one of the inherent powers of a court of equity to correct fraud." This proposition is no doubt true as applied to the powers of a court having jurisdiction of the subject matter in which the fraud is involved; but it no more follows that the mere suggestion of fraud gives a court of equity jurisdiction, than that the suggestion of the deprivation of a legal right gives a court of law jurisdiction where the law has provided no remedy or no tribunal to enforce the right. This discrimination must not be lost sight of, viz., the difference between the jurisdiction, and the extended powers of the court under its jurisdiction.

There was a much wider distinction between the jurisdiction of courts of equity and law in ancient times than there is at present.

"The court of chancery," says Pomeroy, Eq. Jur., §§ 34, 35, "as a regular tribunal for the administering of equitable relief and extraordinary remedies, is usually spoken of as dating from this decree of King Edward III; but it is certain that the royal action was merely confirmatory of a process which had gone on through many preceding years. The delegation made by this order of the king conferred a general authority to give relief in all matters, of what nature soever, requiring the exercise of

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the prerogative of grace. This authority differed wholly from that upon which the jurisdiction of the law courts was based. These latter tribunals acquired jurisdiction in each case which came before them, by virtue of a delegation from the crown, contained in the particular writ on which the case was founded, and a writ for that purpose could only be issued in cases provided for by the positive rules of the common law. This was one of the fundamental distinctions between the jurisdiction of the English common law courts, under their ancient organization, and that of the English court of chancery. This distinction," says the author, "has never existed in the United States. The highest courts of law and of equity, both state and national, derive their jurisdiction either from the constitutions or from the statutes."

And especially has this distinction, so far as inherent powers are concerned, been destroyed in this state by our statute, which provides that there shall be but one form of action in this state hereafter for the enforcement or protection of private rights and the redress of private wrongs, which shall be called a civil action. As a conclusive proof that the correction of fraud under all circumstances is not an inherent power of a court of equity, it is universally conceded that under our form of government neither courts of equity nor law have jurisdiction over political questions which do not involve the rights of private parties; that in such cases the will of the legislature is supreme, and that the contentions arising in such cases must be settled by the tribunals created by the legislature for that purpose, and that if the legislature has provided no remedy for grievances that may be engendered under such laws, it is simply a *casus omissus*, and no remedy can be obtained. The administration of the law is full of such discoveries as these, and as unfortunate as they may be, they furnish no good grounds for an unlawful assumption of authority by the court. So we say, by reason of this universal concession the doctrine of inherent power is destroyed, whether this

prove to be a political question or not. And it seems to us that the removal of a county seat is so essentially and purely a political question that the mere statement of the proposition ought to excuse any further argument.

And so with the further proposition that the plaintiff in this case has no property interest in the suit, which it seems to us is a necessary corollary to the first proposition; for no person can have a property right in a county seat if the removal of the county seat is a political question. The contrary conclusion, if carried into effect, would involve a judicial mixing of rights and remedies that would be incongruous, and little less than ludicrous. In the very nature of things, a person can have no private interest in the location of a county seat. If he has, what does the interest consist of? How can it be shown, and its extent determined? What is the measure of damages? An attempt to answer these questions will show the fallacy of the position.

It is urged that he has a right to vote and to have his vote counted. The right to vote is not a natural right, nor is it an absolutely unqualified personal right. It is a right derived in this country from constitutions and statutes. *McCrary on Elections*, § 11.

His right to vote, then, in this case, was a right conferred by the same statute which provided how the vote should be counted. All the right he had was derived from the statute. It was no broader than the statute, and if the statute has attempted to confer upon him a right, and failed by reason of its imperfection in the way of prescribing remedies, it is simply his political misfortune, and the only relief is in remedial legislation. The authorities, we think, overwhelmingly sustain these propositions, and we will consider them together.

“In the absence of constitutional inhibitions, the legislature has power to declare the certificate of election con-

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clusive, in all cases. It may or may not authorize a contest. If a contest be authorized, the mode of contest and of trial will rest absolutely in the legislative discretion. The legislature has full power to determine what tribunal shall hear and determine the contest, and may confer the jurisdiction upon one of the ordinary judicial tribunals, or upon a judge thereof, or upon any other officer, and may, or may not, authorize a trial by jury." Paine, *Law of Elections*, § 793.

"Unless specially authorized by statute, a court of chancery has no power to enjoin the holding of an election. . . . The doctrine announced is, that courts of equity have no inherent power to try contested elections, and can only exercise such power where it has been conferred by express enactment, or necessary implication therefrom." McCrary on Elections, § 351.

Canvass of the board to determine the result of an election held by order of the board of supervisors by a two-thirds vote of a county, at a meeting in which all the towns were represented, for the purpose of determining the location of the county seat, is conclusive. *Hipp v. Supervisors*, 62 Mich. 456 (29 N. W. 77).

It does not appear from the report of this case whether there was any question of fraud involved, but we must conclude from the language of the court that it would not have made any difference in the disposition of the case, but that it was decided upon the broad ground that it was not a judicial question. Chief Justice CAMPBELL, in delivering the opinion, says:

"The questions are not such as the courts have any right to disturb after they have been disposed of by the only authority which the law has empowered to act upon them. The supervisors, at a meeting when all the towns were represented, by a two-thirds vote, ordered an election to determine upon the proposed removal of the county seat. This election was held, and the board determined the result upon a canvass. That action is conclusive, and no authority exists anywhere to dispute it. The contro-

versy, which is not in any proper sense a judicial one, is closed. The constitution has not empowered this court to settle controversies not judicial, which are very wisely left to the proper local and representative agencies of the people.”

It is argued in this case that there is no discretion vested in the board of county commissioners, but whether that be true or not, it makes no difference in principle whether the discretion was vested in the board of county commissioners or in the judges and inspector of the election. The legislature would have power to invest the discretion in either tribunal, and under our constitution they had invested the discretion and entrusted the board, consisting of the judges and inspector of the precincts, with the power to canvass the votes of the precinct, prepare the returns, and transmit them to the county commissioners; and the county commissioners have been entrusted with the power to canvass the vote as returned by the different election boards, and declare the result; and it can make no difference in principle if the legislature has seen fit to invest different tribunals with discretionary power.

“In the absence of statutory authorization, the courts are without jurisdiction, *ratione materie*, to entertain the case of a contested election, and the consent of parties cannot give them jurisdiction.” *State v. Judge of Second Judicial District*, 13 La. An. 89.

This is not a county seat case, but involves the question of judicial jurisdiction. In that case the court said:

“The contesting of votes is not a judicial function, only so far as made such by special statutes. Indeed, some may have gone so far as to question whether this is not wholly a matter of administration which cannot with propriety be referred to the judicial tribunals at all. At any rate it is clear that such tribunals cannot usurp any greater control over this business than is specially imposed upon them by law. In the absence of a statutory authorization, they are without jurisdiction of the matter, *ratione materie*. The

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consent of parties cannot give jurisdiction, and all courts before whom such an unauthorized controversy is brought must decline, *ex officio*, to render any order which would recognize a right to sustain the case."

In *State v. Police Jury*, 41 La. An. 850 (6 South. 777), the doctrine announced in the case of *State v. Judge of Second Judicial District*, *supra*, was affirmed. This was a parish suit case, and the court, among other things, said:

"It seems well settled that, in absence of express statutory authority, courts of equity will not exercise such jurisdiction. . . . It is ancient, and it has been at all times within the power of the legislature to extend to the courts the jurisdiction which they had declined. The fact that the legislature has not done so, or has extended only a jurisdiction defined and limited, clearly conveys the intention of the department to exclude the courts from any jurisdiction in such matters beyond that expressly granted. Indeed, the assumption of such jurisdiction, in absence of any legislative regulations of method, time and order of procedure, would be fraught with serious consequences. . . . There is no possible reason or consideration for applying a different rule to elections for parish seats from that applied to elections for officers. Both are matters of purely governmental concern, involving only public and popular rights and conferring no private rights which are susceptible of becoming vested."

Skrine v. Jackson, 73 Ga. 377, involved the contest of an election on a fence law. It was decided that that was a part of the political power of the state which the legislature had seen fit to confer upon the ordinary, and the courts had no authority to interfere.

"There are but two modes," said the court, "by which the legality of an election may be inquired into—by the common law and by statute. By the common law an information in the nature of a writ of *quo warranto* was exhibited by the state, upon the relation of some person claiming the office said to be usurped by the defendant, and he was required to show by what authority he held

the office. The legality of his election might be inquired into by this proceeding.” [And some reference is made to the Georgia code.] “It is quite clear that such a proceeding is not applicable to the present case. There is no office, and there is no person claiming an office, and no person exercising an office, but simply a law is declared adopted, which provides for the future that no fence need be used by the citizens of Richmond county. Is there any statute of force in this state, other than has already been referred to, which authorizes the courts to inquire into the legality of this election? None has been pointed out to us, and we have failed to find any. Then, if the remedies provided by the common law fail, and no statutory remedy be provided, is not the presumption conclusive that the legislature did not intend to have judicial interference in this matter, but to leave it to the determination of the ordinary, as provided in the act?”

In *Freeman v. State, ex rel. McDonald*, 72 Ga. 812, it was decided that the legislature could provide a tribunal for the determination of contested elections and that such determination was final and conclusive.

Clarke v. Jack, 60 Ala. 271, was a county seat case, and it was decided that an act to authorize the people of a particular county to vote on the question of removing the county seat, and to permanently locate the same according to their vote, is not a special or local law for the benefit of individuals or a corporation, and that the provisions of the general election law regulating contested elections did not apply to county seat elections, and did not amount to a statutory provision for a contest of such election.

In *Harrell v. Lynch*, 65 Tex. 146, it was decided that voters in a county have in the location of a county seat no such interest as will form the basis of a suit. Said the court:

“As no man has a property right in the location of the county seat, its unlawful removal (no more than a trespass upon the court yard) gives him no cause of action. Being

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deprived of no right, the depreciation in the value of his property is not a wrong for which a court of equity, in the absence of a legal remedy, would invent the means of redress. A valid law authorized the election, the election has been held, the agents appointed to ascertain and declare the result have performed that duty. This accomplishes the fact, and the law here ends the controversy. If a wrong has been done, the usurpation of the power to prescribe a remedy would be a still greater wrong."

Sanders v. Metcalf, 1 Tenn. Ch. 419, is a case involving the removal of a county seat. The court said:

"It is clear to my mind that the legislature has, by this language, entrusted to the county court at its quarterly session, as the proper organ of the county, as a *quasi* corporation, the right to count the votes and declare the result. . . . As soon as the result was declared, the county seat was *eo instanti* changed, as if it had been done by an act of the legislature. The county court were commissioners appointed by the legislature to make the removal by declaring the result of the election, and their act, not being judicial but legislative, is conclusive, and the courts have no power to inquire into its validity."

In *McWhirter v. Brainard*, 5 Or. 426, it was held that, upon the submission of the question of the location of a county seat to an election, the question of fact as to whether the canvass of the vote was correct, and as to what the true vote was, and subordinate questions, cannot be tried in equity.

In *Attorney General v. Supervisors of Lake County*, 33 Mich. 289, it was decided that the question of the removal of a county seat is purely a political question, and does not in any way legally involve the rights of private parties.

There is no distinction made in the cases between cases where fraud is alleged, and where it is not alleged. They are all decided on the broad ground that the question is a purely political one, over which the court has no jurisdic-

tion if it is not specially given by the law making power. Cases supporting this doctrine might be cited at great length. In fact, there are but three states that have held the opposite doctrine.

In *Boren v. Smith*, 47 Ill. 482, it was held that in a county seat case where fraud was alleged a court of chancery would take jurisdiction. The court in that case admitted the general doctrine, but made an exception as to a county seat case, for which we see no reason whatever. They further based their decision on the fact that the constitution has declared that such a vote should be taken before a county seat can be removed, and the court says:

“And in making that provision, it is manifest that it was designed that the will of the majority of the legal voters of the county should control. It would defeat that object, and render this fundamental provision inoperative, if the sense of the majority of the legal voters, constitutionally expressed, might be overcome by illegal voters, or other fraudulent means. . . . As there is no law in England similar to this provision of our constitution, and the organic laws of other states are believed to have no such provision, it is not to be expected that precedents may be found upon which to base the jurisdiction of a court of equity. But if our courts of equity were, in the absence of legislative action, to refuse relief, this constitutional provision could, by fraud, be rendered inoperative and wholly defeated.”

This argument is squarely against the decision in *State, ex rel. Reed, v. Jones*, 6 Wash. 452 (34 Pac. 201), where this court held that, where an act of the legislature had been properly certified, courts had no authority to inquire into any prior proceedings on the part of the legislature to ascertain whether the mandatory provisions of the constitution had been complied with, but that the enrolled bill properly certified to was conclusive evidence of that question. This decision was based upon the theory that the legislature was one of the coördinate departments of the

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government, with equal authority with the others, and that the assumption is a false one, that the "mandatory provisions of the constitution are safer if the enforcement thereof is entrusted to the judicial department than if so entrusted to the legislature." Or, "in other words," said this court, "courts holding the other view have acted upon the presumption that their department is the only one in which sufficient integrity exists to insure the preservation of the constitution."

If, then, the removal of the county seat is a political question (a proposition which cannot be seriously denied), the regulation and control of which under our form of government are within the exclusive jurisdiction of the legislative department, it follows from the logic of *State v. Jones*, *supra*, that the state of facts, properly certified to by the tribunal, solely empowered by the legislature to pass upon the questions involved, must be taken as conclusive. The legislature has made provisions for the determination of these facts. In these provisions it did not see fit to provide for any review or investigation by the courts, and the courts, therefore, are without authority to act in the premises.

People v. Wiant, 48 Ill. 263, is decided on the same grounds. But in neither case is it assumed or intimated that they are following the weight of authority, or any authority at all. As, however, the authorities opposed to the jurisdiction in cases of this kind are so overwhelming, we feel bound to follow them, and it will not be necessary to examine the other questions raised by the demurrer.

The judgment of the lower court is, therefore, affirmed.

ANDERS and SCOTT, JJ., concur.

STILES, J. (*dissenting*):

"An adequate remedy will always be found, either at law or in equity, for frauds perpetrated against the purity

of elections. If a result has been secured by fraud; and the statute has provided no mode of redress, it by no means follows that no redress can be had. The right of any person claiming to exercise any public function or authority under a fraudulent election, may be tested by proceedings in quo warranto, under the principles of common law." McCrary on Elections, § 354.

The context of the foregoing quotation concerns the removal of county seats.

"Where a statute requires a county office to be located at the county seat, mandamus will lie to compel the officer to open and hold his office there. And it is no answer to such a proceeding to show that there is a dispute as to which of two or more places is the county seat. The court is bound to inquire and determine where the county seat is, even if in order to do this it may be necessary to determine as to the legality or result of an election held to settle the question of the location or removal of the same." McCrary, § 366; *State v. Commissioners*, 35 Kan. 640 (11 Pac. 902).

The term "political question" has been made, in the opinion of the court deciding this case, to perform a very large and imposing, but, it seems to me, at the same time, misleading part. I think it is shadow without substance. Titles to office have been from the earliest times proper matters for judicial inquiry, and the writ or information of quo warranto was invented for that purpose. High, Extr. Leg. Rem., chap. 14. From the use of this writ the power to inquire into every step of an election has been but a necessary corollary. Statutes providing for contests, unless they are clearly made exclusive, are only cumulative remedies. High, Extr. Leg. Rem., § 624; McCrary on Elections, § 334. And the returns of canvassing officers are merely *prima facie* evidence of the facts they certify. High, Extr. Leg. Rem., § 638; *Reynolds v. State*, 61 Ind. 392; *State v. Shay*, 101 Ind. 36; *Kane v. People*, 4 Neb. 509.

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But I fail to comprehend wherein an election to determine the location of a county seat differs in its "political" character from that of any other election; and as the founders of the common law found a way over the technical objection that there was no jurisdiction to inquire by what right a usurper occupied an office, and extended their investigations when elections came to be the method of selecting officers, so I deem it not only the right but the duty of modern courts of general jurisdiction to further extend these well established powers to other cases where public and private rights are affected by elections.

My associates have cited the cases which oppose this doctrine, from courts which have declared themselves to be unable to find any remedy for frauds on the ballot, unless there is an office at stake or the statute makes some express provision, and these few cases are credited with overwhelming authority; but to me they are far from satisfactory. To begin with, all but two of them come from southern states, where the tendency has been to sustain election officers and returning boards at all hazards. The principal case cited from Louisiana is *State v. Police Jury*, 41 La. An. 846 (6 South. 777), and the language quoted is very strong; but at page 850 some light is thrown upon the matter, for it is there said:

"Courts of common law undoubtedly claim an inherent right to entertain jurisdiction over contested elections under proceedings in the nature of quo warranto; but referring to the provisions of our code of practice on that writ, it will be seen that they confine that remedy to 'disputes between parties in relation to offices in corporations,' and expressly declare that 'with regard to offices of a public nature, that is, which are conferred in the name of the state by the governor, or by election, the usurpations of them are prevented and punished by special laws.' This common law jurisdiction is, therefore, expressly excluded by our statute."

In fact, the cases cited from Michigan, Georgia, Texas and Tennessee are the only ones which hold squarely that there is no remedy at all. In *McWhirter v. Brainard*, 5 Or. 426, the point here in issue was disposed of in these words:

“There is no special statutory provision for contesting an election for location of county seat; but we think that when the question, in such a case, is the qualification of the voter, the conduct of the judges or the legality of the canvass, the *proper remedy is by mandamus*, and not by injunction in equity;”

showing no disposition on the part of that court to cut off absolutely all inquiry into the merits of the election.

Mr. High yields approval to the remedy by mandamus, where the retention of offices at county seats, or the removal of them to a new location, is in issue. Extr. Leg. Rem., § 79.

As opposed to the cases cited by the majority, two Illinois cases alone are referred to, and of these it is said that they neither assume nor intimate that they followed the weight of authority or any authority at all. Now, these Illinois cases occur in 1868, when there was no constitutional provision concerning the relocation of county seats anywhere but in that state; and it is worthy of remark that both of these cases antedate in time all of the cases holding that there is no remedy without a statute which are now produced in support of that rule. We have precisely the same constitutional prohibition as that construed by the supreme court of Illinois, reading:

“No county seat shall be removed unless three-fifths of the qualified electors of the county voting on the proposition at a general election shall vote in favor of such removal, and three-fifths of all votes cast on the proposition shall be required to relocate a county seat.” Art. 11, § 2.

The supreme court of Idaho recently sustained an in-

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junction against the removal of a county seat as the result of an illegal election. *Doan v. Commissioners*, 2 Idaho, 781 (26 Pac. 167).

In *Sweatt v. Faville*, 23 Iowa, 321, an injunction case, it was said:

“Our law does not provide any method for contest in these cases. . . . That the legislature should make some provision on this subject, and give a speedy, plain and summary method for settling these most warmly contested and, to the public, important controversies, each day renders more and more manifest. Our courts should not be required to pass upon them in the first instance, but a tribunal should be provided where the whole matter could be speedily tried and determined. In the absence of such legislation, can equity grant the relief asked? The case of *Rice v. Smith*, 9 Iowa, 570, is an authority for the exercise of the power, as prayed for in this petition, and we are content to there leave it. In view of all the decisions, and especially the limited duties and powers of the board of canvassers under the writ of mandamus, we know of no other adequate remedy in these cases.”

This decision was rendered in 1867, and the remarks there made concerning the limited powers of the board of canvassers are extremely pertinent here, since under our statutes no grade of election officers has the power to investigate or pass upon anything but the returns which are made by the precinct officers.

In Kansas, in 1870, in the case of *State v. Marston*, 6 Kan. 524, the supreme court held that mandamus would lie to investigate frauds in a county seat election, notwithstanding the statute which allowed twenty days after the date of the election to contest the result; and the opinion, which is a strong one, especially upholds the right of any person who is beneficially interested in a particular place for the county seat, to maintain the suit. The same doctrine was upheld in *State v. Stevens*, 23 Kan. 456; *State v. Commissioners*, 35 Kan. 640 (11 Pac. 902).

In *Calaveras County v. Brockway*, 30 Cal. 326, decided in 1866, although the boards of supervisors in California constituted the canvassing boards of the counties, it was held that the determination of the board of supervisors that a certain town had received a majority of all the votes cast in favor of its location as the county seat, was *prima facie* evidence only of the fact so determined; and that if the fact were otherwise than as determined by the board it would be an unjust denial of the right of the electors of the county to shut the door against all remedy for the redress of the wrong. Mandamus was awarded to contest the result.

In 6 Am. & Eng. Ency. of Law, p. 392, is this statement:

“While the court will not enjoin the holding of an election, or the canvass of the vote, yet when the election is held to determine questions such as the removal of the county seats, or subscribing to capital stock of corporations, and there is no provision for contesting the election, it has been held that an injunction may be granted to prevent the officer from doing the act authorized by the election, where it is alleged that the majority was caused by fraudulent or illegal voting.”

And it is evident that, although the cases *contra* are cited in the notes, the text, in the judgment of the compiler, states the *correct* law of the case.

Michigan has been mentioned as one of the states which upheld the doctrine of non-intervention by the courts in the matter of the removal of county seats, on the ground that such removals were purely political questions over which the courts had no jurisdiction. Yet that court has recently gone so far as to interfere by injunction with the secretary of state in the matter of calling an election for state senators and representatives, one of the grounds for its action being that the act of the legislature making the apportionment violated the portion of the constitution which required each

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senatorial and representative district to contain as nearly as might be the same number of inhabitants as the others.

Now the constitution of that state provided for a census, and it might be supposed that the legislature would have equal means with the supreme court for ascertaining the population of the state and its location in the various counties and cities; and the apportionment of senators and representatives is certainly the very highest exercise of political power of which a legislature is capable; yet in this case the court went behind the face of the law which contained the finding of the legislature as to what the census showed to be the population and where it was located, and inquired into the facts, and finding that gross errors had been committed in the matter of putting an immense population in one district and a meagre population in another, held the law, by reason of the facts, to be unconstitutional, and compelled the secretary not only to refrain from issuing his notice of election under the unconstitutional law, but also directed him to issue the call under a previous statute which had been expressly repealed; and this was done in one case, at least, at the instance of a private citizen who merely alleged that he was an elector of the seventh district. The court said, in *Giddings v. Blacker*, 93 Mich. 1 (52 N. W. 944):

“The basis upon which relief is sought is that the power delegated by the above provisions of the constitution to rearrange the senatorial districts is limited; that this limitation was wholly disregarded by the act in question, and the act is therefore unconstitutional and void. It appears conceded by the learned attorney general that the legislature is not in the exercise of a political and discretionary power when acting under these constitutional provisions, for which it is only amenable to the people, and that this court has jurisdiction, in a case properly before it, to determine the constitutionality of the act in question.”

See also *Board of Supervisors v. Blacker*, 92 Mich. 638 (52 N. W. 951).

Now, if the legislature, in the matter of an apportionment, was not acting under political and discretionary power by reason of the constitutional mandate, so in the matter of re-location of county seats, where the prohibition is, as in this state, absolute and unqualified, the power must be also taken to be limited; and the conclusion would be forced upon us by this argument that if it be a fact that the legislature has passed an act for the re-location of a county seat which provides for no means by which frauds can be detected and the actual validity of the election determined, then the law must be an unconstitutional law in itself. The proposition is reduced to this, under the decision of the court, that the bare dictum of the county commissioners asserting that a vote upon the removal of a county seat has resulted in a certain way is incontestable by any power on earth. This court says that the courts cannot look into it, and the constitution prohibits the legislature from doing so because it can pass no special act on the subject, and no re-submission of the question can be made at an earlier period than four years. Such a delegation of power to a purely ministerial body is otherwise unheard of under the system of state governments prevailing in this country, and the plain spirit of the constitution is clearly against it.

The case of *State v. Jones*, 6 Wash. 452 (34 Pac. 201), has no bearing upon or relation to this subject. The legislature is a coördinate, independent, legislative branch of the state government, set up by the constitution for the purpose of passing laws. Certain restrictions are by the constitution laid upon it as to the method in which it shall operate, and the case above cited merely holds that when it has, by its constituted officers, certified that it has passed a certain law, the courts, recognizing its equal supremacy with themselves in its own department, will not go back of the certificate and enter upon a practically impossible in-

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quiry as to whether or not the forms prescribed by the constitution were followed in procuring the enactment.

But the board of county commissioners is nothing but the ministerial hand of the legislature, provided for the convenient execution of the law which has been passed. It has no sanctity attached to its action, and its proceedings have no more finality than those of any other municipal or executive officer upon whom the duty is cast of executing the laws of the state.

In my judgment, the only question which a court, with the allegations of this complaint before it, should consider, is, what is the proper remedy? To refuse any relief because the legislature has failed to make a complete election law, is to nullify the constitutional right of each elector to vote and have his ballot counted; for it is error to declare, as does the decision, that the right of the plaintiff to vote upon this proposition depended to any extent upon the act of the legislature. Const., art. 6, § 1; art. 11, § 2.

At the time this action was brought the county seat had not been removed from Oysterville, but the removal was imminently threatened. Mandamus, under the highest authority, would have lain to compel the retention of the offices at that place, and the alleged frauds could have been inquired into in that proceeding. Why not by injunction, as well? The sole difference between the pleadings under the two remedies would have been the prayer of the complaint. As filed, the prayer is that the defendants be restrained from moving their offices *from* Oysterville; in mandamus it would have been that they keep them *at* Oysterville. The difference between the remedy by mandamus and the remedy by injunction would be so infinitesimal in such a case as this, that I hold that all regard for the old formal technicalities should have been brushed aside, and the relief demanded by the facts alleged promptly applied.

The briefs of counsel state that the motion to dismiss

was granted by the court below, upon the ground that the plaintiff had a complete remedy by a direct appeal from the order declaring the county seat removed; wherefore the action would not lie. In treating of that disposition of the case it would be necessary to consider the law under which the order removing the county seat is made.

By the general law governing elections in this state (Gen. Stat., title 8, Of Elections), boards of county commissioners have nothing to do with general elections except that they appoint the local election officers. Elections are called by the auditor, and the returns are made to him. The canvass is made by the auditor, the judge of probate of the county and one other county officer who is summoned to that duty by the auditor; and when the canvass has been made and the canvassing officers have certified the result, it is the duty of the auditor to issue certificates of election to the candidates having the highest number of votes. The election returns remain in the custody of the auditor and at no time reach that of the commissioners.

The statute governing the removal of county seats (Gen. Stat., title 38, ch. 3), provides that the board of county commissioners, upon the receipt of the proper petition, must, at the next general election of county officers, submit the question of removal to the electors of the county. Sec. 2459. No method is provided by the statute by which the order of the board submitting the question of removal is to be officially transmitted to the auditor who calls the election. But supposing that *hiatus* to be bridged over and the election to be called, §2462 reads as follows:

“When the returns have been received and compared, and the results ascertained *by the board*, if three-fifths of the legal votes cast by those voting on the proposition are in favor of any particular place, the board must give notice of the result by posting notices thereof in all the election precincts in the county.”

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Now the language quoted above implies as plainly as language can that the board itself shall in some way pass upon the sufficiency of the vote, and here occurs the most serious difficulty in the matter; for we have seen that the election returns, including the poll books and the ballots, all rest finally with the county auditor, and no means is furnished by which the commissioners can acquire legal or official possession of them for any purpose. Therefore, it is impossible to see how the board can, as required, either receive or compare the returns or ascertain the result.

This matter seems to have been entirely overlooked by the legislature in passing the act in question, and the law is therefore radically deficient. The act of February 2, 1888, providing for the permanent location of county seats in new counties, avoided this difficulty by providing that the vote cast at the election for the location of the county seat should be "canvassed, certified and returned in the same manner as at general elections: *Provided*, That the county auditor shall return the result of such election to the county commissioners, who shall meet and declare and enter the result upon their records." Gen. Stat., § 2454. This law furnishes the commissioners with an official basis for their proceeding, viz., the return of the result made by the auditor; but the statute relating to the re-location of county seats furnishes no such means of ascertaining the result.

In the case at bar it appears from the statements in the pleadings that the county commissioners, by some means or other, obtained possession of the poll books and pretended to make a canvass themselves, a thing which the law of elections in no way authorizes or countenances. Probably this course was taken because the officers found nothing in the law directing them how to proceed, and considered the method under which they did proceed as a reasonable method. But the laws governing elections do

not depend upon reasonable methods, but upon express statutory direction. That the method chosen by this particular board is not necessarily the only method, is shown by the fact that in another case now pending before this court, another board pursued the method of calling upon the county auditor to certify to it the return made on the question of re-locating the county seat, by the official canvassers, as though the vote had been taken under the act of 1888. It is needless to say that one or the other of these methods was wrong.

Thus much has been said with a view of showing that while an appeal from the order of the board might bring before the court the sufficiency of the proceedings taken by the board, it would not by any means serve the purpose sought to be arrived at in this case; for the board is not authorized by the statute to enter into any election contest, nor has it any authority whatever to examine ballots or poll books or certified returns.

For these reasons the appeal would have been an entirely inadequate and useless remedy. Possibly the court, upon such an appeal, might have come to the conclusion that, for the reason that the board of commissioners is charged with the duty of canvassing election returns, and at the same time is furnished no means whatever by which it can acquire the possession or right to investigate or consider the returns, the whole statute is rendered nugatory and all proceedings under it void. In that case the remedy by appeal would have been sufficient, since the injunction would have properly followed such a finding; but the point does not seem to have been raised or suggested.

There only remains to consider the question whether a private citizen can interfere. The court says that he cannot because he shows no interest in the subject matter. Every case that I have cited holds to the contrary, and the reason of the thing is to the contrary. In this case it is

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shown by the complaint that the plaintiff has a large property interest in the former county seat. Moreover, the county is there possessed of property in the shape of county buildings which are practically useless for any other purpose and will have to be abandoned by the county. At the new county seat new buildings must be provided. All this must be at public expense, and plaintiff, as one of the tax payers of the county, must help to pay the cost. Moreover, every citizen of a county has a personal interest in the location and place of business for the county officials with whom he has to deal. The courts do not hesitate when a board of county commissioners, under the law, authorize the issuance of bonds whether for the incurring of new indebtedness or for the funding of old, to inquire, at the petition of any citizen, into the legality of the election held for the authorization of bonds. This court has passed upon many such cases, and not a term passes that one or more of them is not before us covering either county or municipal bonds. The logic of this decision would be to deny the jurisdiction of this court in all such cases and leave it wholly to the unbridled determination of purely ministerial officials to determine whether or not the law has been complied with. I cannot subscribe to any such doctrine, and believe that the adoption of it would be wholly mischievous and confusing.

In *Todd v. Rustad*, 43 Minn. 500 (46 N. W. 73), the court said:

“An action for a permanent injunction restraining the removal of a county seat, or the expenditure of public funds, or the creation, unlawfully, of public indebtedness for the erection of county buildings, may, however, be maintained on the ground of an entire absence of legal authority to do the acts complained of, as where the proceedings threatened are under a statute which is unconstitutional, and are wholly unauthorized and void. We see no reason why a citizen and taxpayer should not in such case have the same right to his remedy by injunction,

in a proper case, to restrain the unlawful removal of the county offices as to his remedy by mandamus to compel their restoration to the county seat.”

The injunction was refused in that case only because the statute had provided a summary, adequate mode of procedure for contesting the regularity and validity of the election. To the same effect was *State v. Weld*, 39 Minn. 426 (40 N. W. 561).

In the celebrated Wisconsin apportionment case, *State v. Cunningham*, 81 Wis. 440, 506 (51 N. W. 724), cited and relied upon in the Michigan cases, PINNEY, J., after arguing that the apportionment by the legislature, under the direction of the constitution, was the exercise of legislative rather than political power, closed the question of the court's power to interfere in this language:

“But if it is not strictly a legislative power, if, as counsel contends, it is a mere act of *political power*, upon what possible ground can it be maintained, in the face of the plain provisions of the constitution by which it is limited and restrained, that the delegate in the performance of his trust becomes superior to his creator and may transcend the terms of his commission, and disregard its conditions and limitations, and still his act be deemed valid and conclusive? To so hold would be to declare that the conditions and restraints placed by the constitution upon the exercise of its power, vital to the maintenance and preservation of a popular representative form of government, are only of optional obligation, and that the very guaranties of its perpetuity may be so wrested from their purpose and perverted as to become the speedy and certain instruments to subvert and destroy it. It is clear to my mind that the restraints and conditions annexed to the power abide with it, and when disregarded it is the right and duty of the court to declare the act void.”

Applying this principle to the case before us, I must dissent from the conclusion that the courts can apply no remedy to this confessed wrong.

HOYT, J., concurs.

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[No. 880. Decided January 16, 1894.]

L. B. EICHOLTZ, *Respondent*, v. BEN HOLMES, *Appellant*.

FRAUDULENT CONVEYANCE — INSTRUCTIONS — HARMLESS ERROR.

Where the actual question at issue in an action of replevin is, whether or not the plaintiff had been a *bona fide* purchaser of the property, and the jury make a special finding that the plaintiff did not know that the sale to him was made with intent to hinder, delay or defraud creditors, a charge to the jury that "when a person purchases personal property with the knowledge that his vendor intends by the sale to defraud or defeat his creditors, or hinder or delay them in the collection of their debts, such purchaser will not be affected if he takes the property in good faith in payment of an honest debt," is not prejudicial, even if erroneous for the reason that it may imply that any debt less than the value of the property would suffice. (HOYT and STILES, JJ., dissent.)

Appeal from Superior Court, Cowlitz County.

A. F. Burleigh, and J. E. Lilly, for appellant.

M. E. Billings, and E. W. Ross, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—This is an action of replevin brought by respondent, L. B. Eicholtz, against Ben Holmes, sheriff of Cowlitz county, to recover the possession of certain property which had been levied upon by the sheriff aforesaid as the property of respondent's father, one C. S. Eicholtz, in an action by the Oregon Improvement Company against the said C. S. Eicholtz.

The contention of the appellant is that the alleged sale from Eicholtz, father, to Eicholtz, son, was in fraud of appellant's rights. The actual question at issue in the case was whether or not the respondent was a *bona fide* purchaser of the property. After the trial of the case, among other things, the court instructed the jury as follows:

"You are instructed that when a person purchases personal property with the knowledge that his vendor intends

by the sale to defraud or defeat his creditors, or hinder or delay them in the collection of their debts, such purchaser will not be affected if he takes the property in good faith in payment of an honest debt. Such a creditor violates no law when he takes payment of his debt, although he knows that the other creditors are thereby deprived of the means of collecting their own equally meritorious claims."

It is claimed by the appellant that under this instruction, if the jury believed that any sum whatever was due from the father to the son in this case, if only \$5, and that the property was transferred to satisfy such debt, then it would be valid as against the creditors, even though the fraudulent attempt should be known to the son.

We do not think that the instruction complained of will warrant this construction, but that the jury would understand from the expression, "if he takes the property in good faith in the payment of an honest debt," that reference was made only to the amount of property sufficient to pay the debt. This it seems to us is the more natural construction to place upon the language used.

The testimony in this case shows, or at least it seems to have shown to the satisfaction of the jury, that there was an actual sale of the property from the father to the son; and, in answer to special interrogatories, the jury found that the value of the property at the time of the alleged sale was \$300, and that the amount paid by the son to his father for the same was the sum of \$300; so that, even conceding the correctness of the construction placed upon the instruction by appellant, it would be rendered harmless by these findings of the jury. But it is contended by the appellant that the finding of the jury, so far as the value of the property is concerned, is absolutely without foundation, and a perusal of the testimony satisfies us that such contention is correct, for there is not a syllable of testimony going to show the value of the property to be \$300. On the contrary, all the evidence there is on the subject of the

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value is that of the father and the son, one of them testifying that the property was worth \$490, and the other that it was worth \$450. This corresponds with the allegations of the complaint also, and in the face of this testimony, absolutely uncontradicted by any other, that particular finding of the jury seems to be entirely without warrant.

However, there is another special finding of the jury, viz.: That L. B. Eicholtz, at the time of the alleged sale to him in March, did not know that the conveyance was made with intent to hinder, delay or defraud the creditors of his father. While the finding in this case may not seem to us to be justified, considered with reference to the weight of the testimony, yet there was testimony on that subject which, if the jury believed it, would entitle them as a legal proposition, to render the special verdict aforesaid, and as that was one of the controversies in the case concerning which the testimony was conflicting, it was the special province of the jury to determine that fact in the case, and having determined it, we do not feel justified in disturbing their verdict. In the light of that special finding we say that, conceding appellant's contention to be true, it affirmatively appears that the instruction was harmless; for the purchaser was without the knowledge that the vendor intended by the sale to defeat or defraud his creditors. The same thing may be said of the alleged error of the court in refusing to give instructions 8, 10 and 11, asked by the defendant.

The other instructions asked by the defendant were more in the form of arguments than instructions, and all of them which we think properly stated the law were given by the court on its own motion, though in different phraseology, and we think the charge was a fair statement of the law governing the case.

The judgment will, therefore, be affirmed.

ANDERS and SCOTT, JJ., concur.

HORT, J. (*dissenting*).—I am unable to agree with the conclusions of the majority in the foregoing opinion. The instruction complained of by appellant, and set out in said opinion, while, perhaps, capable of the construction given it by the majority, was such as to equally warrant the construction contended for by the appellant. This being so, it is impossible to say how the jury understood it. Hence it was not such an instruction as the appellant was entitled to. It related to one of the most vital questions in the case, and he was entitled to have a positive, unambiguous instruction as to the law relating thereto. If he did not get it, he is entitled to a reversal of the judgment unless it affirmatively appears that he could not have been injured by the error of the court in that regard. It is conceded that the finding of the jury as to the value of the property, having been only three hundred dollars, was entirely unsupported by the proofs, and that for that reason such finding must be disregarded.

The other reason suggested why such instruction could not have injured the appellant, was that the jury specially found that the respondent had no knowledge of the fraudulent intent of his father at the time he purchased the property. In my opinion this finding is not sufficient to show that the appellant was not injured by the instruction above referred to. It is in no manner made to appear therefrom that the jury in arriving at the general verdict might not have been influenced by their understanding of the instruction. It is a fact well known to all who have had anything to do with juries that they usually arrive at their general verdict first, and then answer the special interrogatories submitted to them, and in so doing so resolve every doubtful question of fact as to sustain the general verdict.

There is another reason why I think appellant is entitled to a new trial. The practically undisputed proofs showed that at the time respondent purchased the property there

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was at most only an unsettled account between himself and his father, on which there was due not to exceed \$200. It further appears that at the time of such purchase this indebtedness was not wiped out, but instead thereof a note for \$300 was given in full payment for the property. For this reason it seems to me that many of the instructions given by the court were inapplicable to the evidence submitted to the jury, and had a tendency to mislead unless they had been supplemented by further instructions in the line of the requests made by appellant and refused by the court. I think that justice demands a reversal of the judgment, and a new trial.

STILES, J., concurs.

[No. 977. Decided January 16, 1894.]

HALEY GROCERY COMPANY, *Appellant*, v. JOHN HALEY,
Respondent.

SALE OF GOOD WILL—CONSTRUCTION OF CONTRACT.

Where a person agrees, for a consideration, not to engage, within a certain time and within certain defined limits, in the grocery business, either in his own name or in that of another, or conduct or engage in such business for any other firm, person or corporation, with any share of the profits, or with any interest in the property, and with no secret or actual accounting or division of either property or profits for his benefit, or for compensation regulated on the basis of profits, or sales of property or stock, it is not a violation of the contract for him to enter the employ of another grocery firm within said defined limits as a salesman upon a monthly salary.

Appeal from Superior Court, King County.

Bausman, Kelleher & Emory, for appellant.

Stratton, Lewis & Gilman, for respondent.

The opinion of the court was delivered by

ANDERS, J.—The respondent was a stockholder and employé of the Haley Grocery Company, of Seattle. In October, 1892, he sold his stock to one Hill, and at or about the same time entered into the following contract with appellant:

“For and in consideration of the sum of \$1.00 to me in hand paid and other good and valuable consideration, the receipt whereof is hereby acknowledged, I undertake and agree with the Haley Grocery Company that within the period of three years from this date I will not engage in the business of wholesale or retail groceries, either in my own name or in that of another, or conduct or engage in any such business for any other firm, person or corporation, with any share of the profits, or with any interest in the property, and with no secret or actual accounting or division of either property or profits, for my benefit, or for compensation regulated on the basis of profits or sales of property or stock.

“This agreement is limited to the city of Seattle, Washington, and to that part of the city lying within a radius of half a mile from the present place of business of the Haley Grocery Company, in the Boston Block on Second street. Outside of said limits I retain all rights of engaging in or conducting the grocery or any other business, either for myself or for any firm, person or corporation, and upon any basis of interest or compensation whatever. (Permission is given for business on Pike street.)”

Some two months thereafter the respondent entered into the service of the Seattle Grocery Company, within the limits mentioned in his contract with the appellant, as a salesman at a salary of one hundred dollars per month, which was his only compensation. The appellant brought this action to enjoin the respondent from remaining in the service of the Seattle Grocery Company, on the alleged ground that such employment was in violation of the contract above set forth. The court granted a temporary

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restraining order, but at the final hearing dissolved the order and dismissed the action. From that judgment the plaintiff appeals.

It will be seen by an examination of the contract in question that the respondent's agreement was not to engage, within a certain time, and within certain described limits, in the grocery business, either in his own name or in that of another, or conduct or engage in such business for any other firm, person or corporation, with any share of the profits, or with any interest in the property, and with no secret or actual accounting or division of either property or profits for his benefit, or for compensation regulated on the basis of profits or sales of property or stock.

The court below held that, by working for a salary, the respondent violated none of the provisions of his contract, and we are at a loss to see how any other conclusion could have been arrived at. The proof is overwhelming that the respondent received nothing but a bare monthly salary as compensation for his services, and the conditions and limitations of the contract itself are so clearly and plainly expressed therein, that, in our opinion, they are susceptible of but one construction.

Judgment affirmed.

DUNBAR, C. J., and SCOTT, HOYT, and STILES, JJ., concur.

[No. 1013. Decided January 16, 1894.]

JAMES PARKE, *Respondent*, v. THE CITY OF SEATTLE,
Appellant.

WRONGFUL TAKING OF LANDS — ACTION FOR DAMAGES — EVIDENCE
OF VALUE — WHEN WIFE NECESSARY PARTY.

In an action against a city for damages for the wrongful appropriation of land, evidence of the price the owner had been offered for the land is inadmissible for the purpose of proving its value.

In an action for damages for the wrongful taking of community real property the wife is a necessary party plaintiff with the husband.

Appeal from Superior Court, King County.

George Donworth, and James B. Howe, for appellant:

The superior court erred in allowing plaintiff to state in evidence, over the objection of defendant, that a man from Portland had offered him \$14,000 for the property. *St. Joseph, etc., R. R. Co. v. Orr*, 8 Kan. 420; *Lewis, Em. Dom.*, § 446; *Watson v. Milwaukee, etc., R. R. Co.*, 57 Wis. 332; *Central Pacific R. R. Co. v. Pearson*, 35 Cal. 247; *Fowler v. County Com'rs*, 6 Allen, 92; *Dickenson v. Fitchburg*, 13 Gray, 546; *Minnesota Belt Line, etc., Co. v. Gluek*, 45 Minn. 463; *Hine v. Manhattan R. R. Co.*, 132 N. Y. 477.

Greene & Turner, for respondent:

The drift of the authorities and the requirements of sound reason impel to the doctrine that sales and offers to sell or buy are admissible to prove value, the jury being left under suitable instructions to judge of the *bona fides* of each transaction and the weight to be attached to the evidence. *Wyman v. Railroad Co.*, 54 Mass. 316; *Sexton v. North Bridgewater*, 116 Mass. 200; *De Merritt v. Randall*, 116 Mass. 331; *Hawkins v. Fall River*, 119 Mass. 94; *Jackson v. Armstrong*, 14 N. W. 702; *Grand Rapids*

8	78
9	410
85*	594
87*	706
8	78
13	32
8	78
120	715
8	78
121	544
31	545
121	644
21	645
8	78
23	390
8	78
24	896

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v. Widdicomb, 52 N. W. 635; *Harrison v. Glover*, 72 N. Y. 451; *Cliquot's Champagne*, 3 Wall. 114; *Hobart v. Young*, 63 Vt. 363; *Hotchkiss v. Germania Fire Ins. Co.*, 5 Hun, 90. A sale of land, or other like adjacent land, is admissible evidence of its value. *Davis v. Charles R. B. R. R.*, 11 Cush. 506; *Wyman v. Lexington, etc., R. R.*, 13 Metc. 316; *Boston, etc., R. R. v. Railroad*, 85 Mass. 142; *Paine v. Boston*, 86 Mass. 168; *Benham v. Dunbar*, 103 Mass. 365; *Chandler v. Aqueduct Co.*, 122 Mass. 305; *Gardner v. Brookline*, 127 Mass. 358; *Sawyer v. Boston*, 144 Mass. 470; *Patch v. Boston*, 146 Mass. 55; *Laflin v. Chicago, etc., R. R. Co.*, 33 Fed. Rep. 415; *Concordia Cemetery Ass'n v. Railway Co.*, 121 Ill. 199; *Roberts v. Boston*, 149 Mass. 347; *Hunt v. Boston*, 152 Mass. 168; *Thornton v. Compton*, 18 N. H. 20; *State v. Scholl*, 47 Mo. 84; *Keiser v. Gammon*, 95 Mo. 217.

The opinion of the court was delivered by

SCOTT, J.—This case has once before been before this court, an appeal having been taken by the plaintiff from a judgment sustaining a demurrer interposed by the defendant. The case was reversed, and remanded for trial. 5 Wash. 1 (31 Pac. 310). A trial was had, and verdict and judgment rendered for the plaintiff, and defendant now prosecutes this appeal.

The first point raised is with reference to proof admitted relating to the value of the premises which were damaged. The plaintiff was allowed to testify, over the objection of the defendant, that a man from Portland had offered him \$14,000 for said property. The respondent contends that this testimony was admissible, although he admits that the majority of the courts of the various states have held otherwise. Some cases are cited by the respondent as favoring his contention; but none of them go to the extent that it would be necessary to go to sustain the admission of this

testimony, and we are clearly of the opinion that its admission was erroneous. *Hine v. Manhattan Railway Co.*, 132 N. Y. 477 (30 N. E. 985). It is further contended by the respondent that, if the court committed error in this particular, the testimony was not prejudicial to the defendant, on the ground that it is apparent that the jury attached no weight to it; but we think the record fails to show this, and consequently its admission was harmful error.

A second point is raised with reference to the liability of the city for its acts in the premises. This question was disposed of in the former appeal, and is, therefore, not entitled to consideration at this time.

It is further contended by appellant that the court erred in not giving certain requests to charge submitted by the defendant, relating to contributory negligence upon the part of the plaintiff; but, as we view the case, there was nothing upon which a claim for contributory negligence could be based, and for that reason the court properly refused to give said instructions.

The further point is raised that the plaintiff could not maintain this action for the reason that the real estate damaged was community property of the plaintiff and his wife, and that it was necessary for them to join in an action for damages thereto; and we are of the opinion that this point is well taken. The respondent admits that such real estate was community property, but he contends that the husband, in such cases, can maintain an action, and that such actions are customarily brought in the name of the husband, only, in this state. However this may be, it seems to us that they are not properly so brought. The claim of the plaintiff in this case is based upon the fact that the acts of the city in the premises amounted to a wrongful taking of his property; that any damage which destroys substantial value, and inflicts irreparable and permanent injury to such real estate, is a taking, etc. It would not

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Syllabus.

be contended—at least, it could not be successfully contended—that the husband alone could authorize such a taking or damaging of the community real estate in the first instance; and to allow him to bring an action for the recovery thereof would be simply permitting him to do indirectly that which he could not do directly. If he has authority to maintain such an action, it follows that he has authority to compromise it, and to release the claims for which the same was brought. A contrary view was entertained by this court in *Brotton v. Langert*, 1 Wash. 73 (23 Pac. 688).

Reversed.

DUNBAR, C. J., and ANDERS, J., concur.

HOYT and STILES, JJ., concur in the result.

[No. 1138. Decided January 16, 1894.]

LUCY YOUNG, *Respondent*, v. JOHN YOUNG AND MARY YOUNG, *Appellants*.

8	81
27	560

DAMAGES—DEPRIVING WIFE OF HUSBAND'S SOCIETY AND SUPPORT
—SUFFICIENCY OF EVIDENCE.

In an action for damages by a wife against her husband's father and mother for causing her husband to abandon her and for depriving her of support and maintenance, the plaintiff should be non-suited when her evidence merely shows that she was driven away from the house of defendants, where she and her husband had been living with his parents, that he did not go with her, that her mother-in-law had said that her son would not live with plaintiff any longer, that plaintiff's husband failed to keep an appointment to meet her, and that the mother-in-law had requested another person to use influence to prevent her son from again living with plaintiff, for the reason that if he did so his father would disinherit him.

6—8 WASH.

Appeal from Superior Court, Clarke County.

N. H. Bloomfield, M. J. McMahon, and Miller & Stapleton, for appellants.

W. H. Metcalf, and Dell Stuart, for respondent.

The opinion of the court was delivered by

ANDERS, J. — This action was brought by the respondent against the appellants to recover damages for causing her husband, who is a son of the appellants, to abandon her and to refuse to live with her as her husband, or to provide a home for her, and for depriving her of his society and affection, and of support and maintenance. A trial was had, resulting in a judgment for plaintiff, to reverse which the defendants have appealed to this court.

At the close of the plaintiff's evidence, the defendants moved for a non-suit, which motion was denied, and the defendants excepted. The appellants earnestly insist that this ruling was error, and we are inclined to agree with them. In our opinion the evidence was so unsubstantial that it amounted to a mere probability in favor of plaintiff's cause of action, and, therefore, in the language of the code, wholly "failed to prove a sufficient cause for the jury."

The facts disclosed by the record are briefly these: The respondent was married to Philip Young on May 4, 1892, she being at that time nineteen years old, and he twenty-four years old. Immediately after their marriage, the respondent and her husband went to reside with the appellants on their farm, about a mile distant from the home of the respondent, and remained there together until March 19, 1893, at which time she returned to the home of her parents, where she afterwards remained separate and apart from her husband, who continued thereafter, as before, to reside with the appellants.

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It is claimed by the respondent that her going away was not of her own volition, but that she went because the appellants refused to permit her longer to remain at their home. It is not shown, however, that any force or violence was used or threatened against her to cause her to leave, or that she was in any way maltreated or misused by appellants while she resided at their house. But their intercourse with each other was not always pleasant and amicable. Disputes and disagreements sometimes arose for which one party was probably as much to blame as the other. On one occasion respondent took exception to some remarks concerning her father, made by one of appellant's children, and, during the controversy, Mary Young said to the respondent if she did not like the way the boys talked she could "pack up her things and get out." Respondent's husband told her to overlook this remark of his mother, which she did, and thereafter thought no more about it.

This was about Christmas time, and no further trouble occurred until the 17th of March following. On that evening there was a dance at Grange Hall, and Philip asked Lucy to accompany him there. She at first consented, but when the time came to go she told Philip she was not feeling very well and would remain at home, and he went alone. During the evening and after Philip had gone, the appellant John Young asked Lucy why she did not go to the dance and she told him she did not feel well. He then said to her she did not look sick, and had not said anything about it before, and that it was not right to treat Philip that way. She then replied that Philip had no objection and was willing that she should remain at home. The appellant Mrs. Young then remarked to Lucy that she had not done as a married woman should do in sending her husband off alone, and that it was not because she was sick at all, but because she had a stubborn head on her.

The respondent retorted, "I have not been happy since I have been in this house—I have not seen a happy day since I have been here." This statement displeased Mr. Young, and he thereupon said to respondent, "If you haven't been happy, get up and get out." When Philip came home Lucy told him what had occurred, and said she would go away the next morning. Philip "cried and took on," and said, "Stay, and it will be all right in a few days."

Respondent did not leave the next morning, however, but went down and worked around in the kitchen, and finally told Mrs. Young she would overlook what had been said and it would be all right. But Mrs. Young was not in a forgiving mood at that time and bluntly remarked to Lucy that she would overlook nothing, and that she, Lucy, could pack up and get out. But Lucy evidently did not consider this remark of Mrs. Young as an imperative command to leave the premises, for she remained at work about the house all day. After the work was all done she went over to the house of her father and mother, informed them of her troubles, and, according to her own testimony, "told them to come over Sunday and we would see what arrangements we could make, and if we did not come to any satisfactory arrangements I would come home with them."

Satisfactory arrangements not having been made on Sunday, the respondent got ready to go home with her parents, but at the request of her mother and her husband, who begged her not to go away, concluded to remain with her husband. After the respondent's father and mother had started for home, appellant Mrs. Young said to respondent, "I thought you were going." Respondent replied, "I am going to stay for Philip's sake;" whereupon Mrs. Young rejoined, "No; you will not. You have got ready to go, now go." Respondent had previously "packed up

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her things," and, after telling her husband she had to go, she left the house of appellants, without further ceremony, and for aught that appears in the record, never returned or offered to return to her husband.

The above is substantially all of the evidence produced by the respondent to prove that the appellants, or either of them, compelled her to leave their house, and, if it be conceded that what was said to her by appellant Mrs. Young was sufficient to justify her leaving, still she can sustain no cause of action upon that ground alone. Appellants were under no legal obligation to provide a home either for her or her husband. And granting that they drove her away without provocation, and simply permitted but did not persuade or otherwise influence their son, her husband, to remain with them, still no action can be maintained against them therefor. While the appellants would have no right to prevent their son from following his wife wherever she might choose to go, they certainly would not be liable in an action for damages by reason of his refusing to do so, without proof that such refusal was the result of the exercise of some improper influence by them.

In this case there is no direct evidence whatever showing that respondent's husband ever refused to live with, or support, her, or that his affection for her was any less ardent at the time of the trial than it was when she left his home and he shed tears at the parting. Nor is there any positive evidence showing that the appellants, or either of them, ever, by word or deed, undertook to induce their son to abandon his wife, or to refuse to "return to her," as alleged in the complaint.

But it is claimed on behalf of the respondent that all of these necessary facts are made evident by certain circumstances appearing in the case, the first of which is that, two days after the respondent left the house of appellants, the appellant Mrs. Young told respondent's father that he

might as well understand that Philip would live no longer with Lucy. But whether Philip had told her so or whether she was merely expressing an opinion based upon some other source of information, is not disclosed. If it be conceded that this declaration is some evidence against the declarant, it must also be conceded, we think, that its weight is but little more than infinitesimal.

The next circumstance relied on is that, some days after their separation, Philip and Lucy made an arrangement to meet at the house of Mr. Ricketts, at a certain time, and, when the appointed time arrived, Lucy went there, but Philip did not. Now what does this testimony show? It simply shows that Philip failed to keep his word; but why he did so is a mere matter of speculation or conjecture, and is no more proof that his parents kept him away than it is that some unavoidable accident prevented him from going.

Again, it was shown by the testimony of Mrs. Ricketts, over the objection of defendants, that after the respondent had gone to reside with her parents, the appellant Mrs. Young requested the witness to use her influence to prevent Philip from again living with Lucy, and stated as a reason for making the request that if Philip did so his father would disinherit him, and that would break her heart. It is not shown, however, that Mrs. Ricketts ever mentioned the matter to Philip, or that anything further was said upon the subject by Mrs. Young. This conversation could, of course, in no way affect the appellant John Young and, as to Mrs. Mary Young herself, it simply showed a desire to have her son Philip continue to remain, as he then was, separate and apart from his wife, the respondent, and a willingness on her part to endeavor to induce him to so remain. But it falls far short of showing that Philip's action was in fact the result of influences brought to bear upon him by the appellants, or even by Mrs. Mary Young alone.

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Syllabus.

Taking the above evidence all together—and it is all there was that was material before the court when the motion for non-suit was made—it seems too clear for argument that it entirely failed to establish plaintiff's cause of action. No verdict could have been rationally based upon it in favor of the respondent, upon whom was imposed the burden of proof, and, therefore, the motion for a non-suit should have been granted.

The judgment is reversed and the cause remanded, with directions to enter a judgment of non-suit, upon defendant's motion.

STILES, SCOTT and HOYT, JJ., concur.

DUNBAR, C. J. (*concurring*).—I concur in the result because I do not think there is any testimony in the case to establish the allegations of the complaint. It probably established the fact that the defendants drove their daughter-in-law away from their home; but it goes no further than that; and that they certainly had a right to do.

[No. 1139. Decided January 16, 1894.]

I. D. FORD, *Appellant*, v. D. E. DURIE, *Treasurer of the City of Seattle, Respondent*.

MUNICIPAL CORPORATIONS—EFFECT OF REFERENCE TO GENERAL LAWS IN CHARTER—SALES FOR DELINQUENT TAXES—TAX DEED.

The provisions of art. 9, § 34, of the freeholders' charter of Seattle relating to the execution of deeds for property sold for delinquent taxes, and providing "that no such deed shall be made until the notice is given that a tax deed will be applied for and such notice duly served as prescribed in the laws of the state of Washington relating to property sold for state or county taxes," merely refers to the law in force at the time of the execution of the deed, and not to that which was in force at the time of framing the charter. (DUNBAR, C. J., dissents.)

8	87
12	689
8	87
10	201
35*	595
35*	1062
38*	1031
8	87
16	78

Where a sale for delinquent taxes has been made under the revenue act of 1891, which required no notice of the application for a tax deed, that law will govern the execution of the deed under such sale, although prior to its execution the law of 1893, requiring notice to be given, may have taken effect.

Appeal from Superior Court, King County.

W. D. Lambuth, for appellant.

George Donworth, and *James B. Howe*, for respondent.

The opinion of the court was delivered by

HORT, J.—But a single question is presented by the record in this case: Was the law in relation to the execution of deeds for lands sold for state and county taxes in force at the date of the adoption of the charter of the city of Seattle so made a part thereof by the provisions of § 34 of art. 9 of said charter that a subsequent change in the law relating to such sales would have no effect upon the law repealed by such subsequent legislation so far as it related to the provisions of said charter?

To ascertain the intent of the framers of the charter in that regard, it will be necessary to look at other provisions contained therein, from which it will clearly appear that it was their aim to assimilate all proceedings for the collection of taxes under the charter, so far as practicable, with those of the general law in force at the time of such collection. Interpreting the language of this particular section in the light of these provisions and the evident intent of the framers of the charter as shown therefrom, it must be held that no specific provision of the statute in force relating to the execution of deeds for property sold for delinquent taxes was so made a part of the charter as not to be affected by subsequent general legislation. The language used is as follows:

“Provided however, That no such deed shall be made until the notice is given that a tax deed will be applied for

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Opinion of the Court—HOTT, J.

and such notice duly served as prescribed in the laws of the State of Washington relating to property sold for state or county taxes.”

The force of such language as well authorizes the contention of the appellant that it refers to the law in force at the time of the making of the deed, as that of respondent that it refers to that in force at the time of the adoption of the charter, and the intent of the framers of the charter, as manifested by other provisions, makes it necessary that we should hold with the appellant that they intended by such language to refer to the law in force at the time when the deed was to be executed.

There is little force in the contention of respondent, that such could not have been their intention for the reason that when thus construed the proviso was only a repetition of the provision already made in §15 of said article. It is not such an unusual thing for charters and laws to contain unnecessary repetitions that much significance can be attached to such fact.

Without this provision of §34, the regulations relating to the making of deeds for lands sold for state and county taxes would have been applicable to tax deeds to be executed by the authority of the city. But the framers of the charter thought best to make this more certain by the proviso in the section expressly relating to the execution of the deeds. The only effect of such proviso was to require that the city treasurer should not execute such deeds until the notice required by the general statutes in force at the time had been given, and if such statute required no notice whatever, then none was necessary, as a foundation for the application for a deed from the city treasurer.

A question somewhat similar to this was decided by this court on October 31st last, in the case of *Newman v. North Yakima*, 7 Wash. 220 (34 Pac. 921), and a like conclusion arrived at.

The judgment must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

STILES, SCOTT and ANDERS, JJ., concur.

DUNBAR, C. J. (*dissenting*).—Construing all of the provisions of the charter together, I am unable to reach the conclusion arrived at by my brothers, and I therefore dissent.

ON PETITION FOR RE-HEARING.

HORT, J.—Upon the hearing of this cause the argument was confined to a single question, and the opinion heretofore filed had reference only to that question.

The petition for re-hearing calls to our attention the fact that such opinion, technically construed, would warrant the conclusion that the statute of 1893 would constitute the law under which the deed in question should be executed by the treasurer. We, therefore, deem it necessary now to say that we did not intend so to hold. The sale was made when the law of 1891 was in force, and the right to the deed then fixed, except that the time in which the property could be redeemed had not fully expired. Under these circumstances the power of the legislature to provide that the right, which under the law would become fully vested by the lapse of time, should be taken away, unless something which constituted an additional burden upon the purchaser should be performed by him, may well be questioned. It is not, however, necessary that we should decide as to that as in our opinion the law of 1893, for other reasons, did not apply to the sale in question. Under such statute the right of the purchaser would be entirely destroyed unless within forty-one days after the passage of the act he took the additional step required. This was not a reasonable time. Hence, under well settled principles of statutory construction it must be held that such statute was not applicable to the sale in question.

STILES, ANDERS and SCOTT, JJ., concur.

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Argument of Counsel.

[No. 1160. Decided January 16, 1894.]

F. D. HENNESSY, *Respondent*, v. THE NIAGARA FIRE INSURANCE COMPANY, *Appellant*.

INSURANCE—ACTION ON POLICY—WAIVER OF CONDITIONS—EVIDENCE—DEPOSITIONS.

The denial of liability by an insurance company for a loss is a waiver of a condition of the policy requiring arbitration in case of a disagreement between the company and the assured as to the amount of the loss.

Where the defense to an action upon a policy of fire insurance is that the assured swore falsely in his proofs of loss, the proofs are admissible in evidence.

Proof by an insurance company of what it would cost to repair a building damaged by fire is not admissible for the purpose of showing the extent of the fire.

The reasons which authorized depositions and which existed at the time they were taken will be presumed as still in existence at the time of the trial, if nothing appears to the contrary.

Appeal from Superior Court, Spokane County.

Jones, Voorhees & Stephens, for appellant:

Proofs of loss are *ex parte* statements, and not legal or competent evidence for anything or any purpose to go to the jury. *Cascade, etc., Ins. Co. v. Journal Pub. Co.*, 1 Wash. 455; *Hiles v. Hanover Fire Ins. Co.*, 27 N. W. 350; *Lycoming Mutual Ins. Co. v. Schreffler*, 44 Pa. St. 273; 42 Pa. St. 191; *Kittanning Ins. Co. v. O' Neill*, 1 Atl. 592; *Commonwealth Ins. Co. v. Sennett*, 41 Pa. St. 162; *Lycoming Fire Ins. Co. v. Rubin*, 79 Ill. 408.

Hyde & Reagan, and *Turner, Graves & McKinstry*, for respondent:

Appellant having placed its refusal to pay upon the ground that the amount of loss had been falsely sworn to, it cannot now object upon other grounds not then given. May,

Ins. (2d ed.), § 470, and cases cited; Wood, Fire Ins. (2d ed.), § 443, and cases cited; *Bennett v. Maryland Ins. Co.*, 14 Blatchf. 422; *Planters Mutual Ins. Co. v. Deford*, 38 Md. 382; *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 32.

The opinion of the court was delivered by

SCOTT, J.—This action was brought on an insurance policy to recover the amount insured on a stock of merchandise which was burned. Judgment was rendered for the plaintiff, and the defendant appeals.

It is contended that the action was prematurely brought, in that the plaintiff failed to furnish proofs of loss after the fire, under the conditions of the policy, and in that the policy provided that in the event of a loss and in case of a disagreement as to the amount thereof, the same should be ascertained by two competent and disinterested appraisers, the assured and the company each to select one and the two so chosen to select a competent and disinterested umpire.

It appears that proofs of loss were furnished by respondent to appellant, and that they were rejected for certain reasons, which were specified; whereupon respondent again furnished proofs which complied with said objections. These proofs were returned to him with a denial upon the part of the company of any liability, on the ground that the claimant had sworn falsely in making his proofs of loss. The last proofs furnished appear to have been technically correct under the terms of the policy, and the appellant having denied any liability whatever for the loss on the ground of false swearing, could not rely upon the provision of the policy relating to an arbitration in case of disagreement as to the amount of such loss. Furthermore, it does not appear that either party demanded that such an arbitration be had, and these points are not well taken.

It is further contended that the court erred in admitting

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the proofs of loss in evidence, and that the same should not have been submitted to the jury. It is contended by the respondent that the proofs were not submitted to the jury, and the record fails to show that they were. The proof was properly admitted for the purpose of showing that the plaintiff had complied with the terms of the policy in furnishing such proofs, even though this was a question for the court alone to determine. These proofs, however, subsequently became relevant in relation to the defense set up that the plaintiff had sworn falsely therein.

It is further contended that the court erred in allowing two depositions to be read in evidence. These depositions were taken a short time before the cause was brought to a trial, for the reason that the witnesses were about to depart from the jurisdiction of the court. It is not claimed that there were not sufficient grounds for taking them in the first instance, but it is contended that under § 1677, Code Proc., it should have been made to appear at the trial by the party offering them that the witnesses could not be brought to testify in person. We are of the opinion that this point is not well taken. Nothing appearing to the contrary, it will be presumed that the reasons which existed at the time the depositions were taken, and which authorized them, were still in existence at the trial, and it was incumbent on appellant to show otherwise to avail itself of such objection.

It is further contended that the verdict is unsupported by the evidence, and that no recovery should have been allowed upon the ground that the plaintiff swore falsely in making his proofs of loss aforesaid. A good deal of testimony was introduced upon the part of the defendant to the effect that it would have been impossible for the plaintiff to have sustained the loss claimed by him under the circumstances which were proven to have existed. There was some counter evidence, however, and the whole matter

was for the jury to determine, and in finding for the plaintiff it must be held that they found for him upon all of these issues. We are of the opinion that there was testimony sufficient to sustain the verdict, and that there is no ground for any interference therewith by an appellate court in this particular.

The last error alleged is, that the court erred in refusing to permit the defendant to prove the damage to the building by the fire in question, in order to show the extent of the fire. An inspection of the record shows that the court did permit proof of the extent to which the building was damaged, but refused to allow the defendant to prove what it would cost to repair the building.

We find none of the points alleged as error to be well taken, and the judgment is, therefore, affirmed.

DUNBAR, C. J., and STILES, ANDERS and HOYT, JJ.,
concur.

[No. 1171. Decided January 16, 1894.]

ROBERT WINGATE, *Appellant*, v. R. A. KETNER, *Auditor*,
et al., *Respondents*.

TAXATION IN CITIES OF FIRST CLASS—DECLARATORY PROVISIONS—
BASIS OF LEVY.

The statutory provision requiring the common council of a city to make a tax levy within thirty days after the assessment roll has been certified to it, is declaratory instead of mandatory, and failure to strictly comply therewith would not deprive the city of the right to make a tax levy for the year.

Although a city of the first class had, under the provisions of its charter, levied a municipal tax for the year 1893, the city had the power, under the act (Laws 1893, p. 167) providing for the assessment and collection of taxes in cities of the first class, to levy an additional tax upon the basis of the tax roll of the county for the year 1893.

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Appeal from Superior Court, Pierce County.

S. C. Milligan, for appellant.

F. H. Murray, for respondents.

The opinion of the court was delivered by

HORT, J.—Appellant brought this action to restrain the city of Tacoma and the auditor of Pierce county from proceeding in the levy of a certain tax of five mills on the dollar which the common council of said city, had by ordinance, directed to be spread upon the roll certified to them by the county assessor, as required by statute (Laws 1893, p. 167). The lower court adjudged him entitled to no relief, and dismissed his complaint, and from the judgment of dismissal he prosecutes this appeal. He presents to this court but two reasons why the tax, if assessed, will be illegal: *First*, Because the common council had no authority to levy it; and, *second*, that the ordinance making the levy was not passed until more than thirty days after the roll had been certified to the common council.

It is only necessary to say, as to the second question, that construing all the proceedings relating to the certifying of the said roll to the common council, and the passage by it of the ordinance in question, it fairly appears that such ordinance was passed within the thirty days provided by statute. But, even if it was passed after the expiration of said thirty days, that fact alone would not render it invalid. The limitation as to the time is not so mandatory that the least neglect to comply therewith would deprive the city of the right to make any tax levy for the year.

The determination of the other question depends upon the construction of the act passed March 9, 1893, providing for the assessment and collection of taxes in cities of the first class, in connection with the provisions of the general revenue act. It is contended on the part of the ap-

pellant, in relation to these statutes, that when they are construed together it is not made to appear therefrom that it was the intention of the legislature to provide that cities which had made and collected a tax levy during the year 1893 should have the right to make a further levy upon the basis of the assessment roll for the county for the same year.

We are unable to agree with this contention. By the provisions of § 2 (Laws 1893, p. 167) of said act of March 9th it is made the duty of all cities of the class to levy a tax in the fall of each year upon the basis of the assessment roll, to be certified to them by the county assessor. And by force of such section it is clear that the city of Tacoma would have been authorized to make the tax levy in question at the time it was made if it had not already made a levy for the year 1893 in accordance with the provisions of its own charter. And as there is no provision of either of the statutes under consideration which in any manner affects the power so granted to all cities of the class, except the provisions of § 9 (Laws 1893, p. 170) of said act, it must follow that if said § 9 had been omitted there would be nothing to prevent the city from making the tax levy in question. Under the provisions of the act, unaffected by said section, the city of Tacoma would not have been authorized to have completed the assessment for the year 1893 under the provisions of its charter. And, except as aided by that section, its proceedings to that end would have been irregular and void, but we are unable to see how that fact, or any fact in relation to that levy, could in any manner affect the right of the city under the general provisions of the act to levy the tax in question. Section 9 was, in effect, an exception in favor of cities which, under the provisions of their charter, were about to levy a tax, and was inserted for the purpose of protecting their right so to do. It contained no words which in any

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manner made such exception affect the provisions of the act by which general power was conferred upon all cities of the class to levy the regular tax upon the roll certified to it by the assessor of the county. It will be noticed that the power conferred by § 2 above referred to is so worded that it can be made available to cities whether, under their charters, the tax levy was for the current or ensuing year, and for that reason the tax in question could not be affected by the fact that it was for the ensuing year.

It follows from what we have said, that even if the contention of the appellant that the clause at the end of § 9 was invalid is correct, it would not justify his contention, that on account of such invalidity the tax in question must fail. The language to which he takes exception was inserted to make certain the intention of the legislature, that the power conferred by § 2 of the act to levy a tax in each of the cities such as the one under consideration could in no manner be affected by reason of the permission contained in § 9, under which the levy in progress at the time of the passage of the act might be continued under the provisions of the charter.

No constitutional or other reason has been suggested by counsel why the legislature had not the power to authorize the assessment of taxes for the year 1894 upon the basis of the tax roll of the county for 1893, and as the intent of the legislature to authorize such a proceeding appears clearly from the legislation, we must hold that the tax so levied is valid.

The judgment must be affirmed.

DUNBAR, C. J., and ANDERS, SCOTT and STILES, JJ.,
CONCUR.

8	98
10	522
35*	506
39*	246

[No. 943. Decided January 17, 1894.]

D. B. MOORMAN AND KATE W. MOORMAN, *Respondents*, v.
SEATTLE & MONTANA RAILWAY COMPANY, *Appellant*.

EVIDENCE — VARYING WRITTEN INSTRUMENT — FAILURE OF CONSIDERATION FOR CONVEYANCE OF LAND — MEASURE OF DAMAGES.

Where, in an action against a railroad company for damages for failure to dig a ditch, a written contract is set out in the complaint containing a conveyance of a right-of-way to the railroad on the condition subsequent that it excavate a certain ditch, evidence tending to show other terms of the contract which had not been included in the writing is inadmissible.

A railroad company agreed to build a certain ditch in consideration of the conveyance to it of lands for right-of-way purposes. At a meeting of the land owners affected it was agreed that M. should convey a strip of land for right-of-way, which was appraised as worth \$1,000, and that adjoining land owners whose premises would be benefited by the ditch should give their notes to M. for \$1,000, conditioned upon the construction of the ditch by the railroad company. The appraisers were selected by the land owners from their disinterested neighbors. The company's right-of-way agent who negotiated for the conveyances was present at the meeting, and received from the land owners their assent to his proposal to dig the ditch for the right-of-way, but it was not shown that the agent participated in any of the arrangements made between the ditch beneficiaries, nor that he was consulted in regard to the appraisement or the award of notes. The conveyance was made, but the company failed to dig the ditch, and M. brought suit for damages in the sum of \$1,000, as fixed by said appraisement and notes. *Held*, That the company's liability could not be measured by the appraisement had by the land owners among themselves, and that the report of the appraisers was not admissible in evidence.

Appeal from Superior Court, Skagit County.

Burke, Shepard & Woods, for appellant.

Million & Houser, for respondents.

The opinion of the court was delivered by

STILES, J. — Respondents sued to recover \$1,000 damages for the failure of the appellant to dig a certain ditch, other

damages claimed in the complaint being abandoned at the trial. This measure of damage was sought to be deduced, and was sustained by the court below upon the theory that the appellant had in some way made itself liable for the default of certain third parties in failing to pay respondents the sum mentioned as a consideration for their conveyance to appellant of a right-of-way for its railroad. The allegations of the complaint were very strongly put, and this fact may have led to the admission of much incompetent testimony. What respondents proposed to prove was, that the appellant had procured from them a conveyance of a strip of land for right-of-way purposes under an agreement participated in by both parties to this case and by the third parties mentioned, to the effect that if the respondents would convey the right-of-way the appellant would dig the ditch, and the third parties would pay the \$1,000; but the proof went no further than the establishment of a contract between respondents and appellant, under which the former made a conveyance and the latter agreed to dig the ditch. This contract was in writing, being the conveyance itself, which contained the stipulations concerning the ditch, in the habendum, as follows:

“To have and to hold the said premises, with appurtenances, unto the said party of the second part, and to its successors and assigns forever, subject to the following conditions, which are made a part of the consideration of the foregoing transfer: The said party of the second part, its successors and assigns, shall excavate and maintain a continuous and sufficient ditch, not less than four and one-half feet deep, along each side of its grade or embankment, across the aforesaid strip of land, to carry off the drainage of the lands adjacent thereto, and shall continue and maintain a suitable and sufficient ditch, not less than four and one-half feet deep, on one or both sides of its grade or embankment, to a point on or near the south boundary line of Skagit county; . . . said ditch or ditches to be completed to their outlets on completion of the road.”

The road was completed but the ditch was not built, and the appellant admits that it does not intend to build it, for the reason that the country is so nearly level that a ditch along its right-of-way would be of no value whatever for drainage.

With the written contract of the parties pleaded as a part of the complaint, it was error for the court to admit evidence tending to show terms of the contract which had not been included in the writing. By a reformation of the deed, alone, could such evidence have become competent.

But, had this evidence been admissible, it would have been insufficient. It was shown that in 1890 the county commissioners had ordered the construction of a ditch along the line of the route afterwards selected by the appellant under the ditch law of that year (Acts 1890, p. 652), but the appellant appeared, and proposed to land owners interested in the proposed ditch, that if they would donate to it a strip of land for its right-of-way, it would construct and maintain the ditch free of further cost to them. This offer was accepted, and the commissioners abandoned their proposed work. But a number of owners of land which did not lie in the route of the ditch, but which was expected to be benefited by it, were called upon to contribute money, according to the benefits to be received by them, sufficient to pay the owners of those lands which were to be taken for the right-of-way the fair value thereof. A conference of all these owners was held, and it was agreed among them that three disinterested neighbors should appraise the value of each parcel, and that notes should be given by the benefited owners to cover the awards. These notes were conditioned that they were to be void if the appellant should fail to build the ditch, and \$1,000 worth of the notes were awarded to respondents, but the failure of the appellant to build the ditch has rendered them worthless.

The appellant's right-of-way agent, who negotiated for the conveyances, was present at the meeting when the arrangements described were made, and received from the land owners their assent to his proposal to dig the ditch for the right-of-way, and a form for the condition which they wished inserted in their deeds; and, from the fact of his presence there, it is sought to fasten upon the appellant a liability measured by the amount of the notes assigned to the respondents. But, taking the respondents' evidence at the strongest, we are unable to see how any such result can be wrought out. It was not shown that the agent participated in any of the arrangements made between the ditch beneficiaries. He had no voice in the choice of the appraisers, and never was consulted in regard to the appraisal or the award of notes.

The rule that is invoked by the respondents seems to be that laid down in *Skagit Railway & Lumber Co. v. Cole*, 2 Wash. 57 (25 Pac. 1077); but the cases have no similarity in principle whatever. Cole was allowed to recover the actual, direct losses he suffered, so far as they were held to be within the necessary contemplation of the parties to an executory contract. But here there is an executed sale of land, for a certain consideration expressed in the deed; and if that consideration has wholly failed, and the provision in the deed with regard to a ditch constitutes a covenant, the usual rule of damages in such cases should be applied. Such a rule the parties must be held to have contemplated, not a rule set up and applied by an *ex parte* tribunal of appraisers, whose action received no assent from the appellant either at the time they were appointed, or when they acted or afterwards. It is quite likely that the consideration which moved the respondents was the building of the ditch for the benefit of their own land, and the receipt of the \$1,000, and appellant's agent may have known that without both he could not secure the deed; but

it is not shown that the agent in any way undertook to procure the payment of the money, or that it was ever suggested to him that a sum of \$1,000 and the building of the ditch were equivalents for the right-of-way. Much less does he appear to have assented to that proposition. The court admitted the report of the appraisers to establish the damage, and thereby adopted an erroneous basis of admeasurement.

Other interesting questions were presented in the case, but they are unnecessary to its determination. As the only damage alleged and persisted in was the loss of the proceeds of the notes, the judgment must be reversed, and the cause dismissed.

ANDERS and HOYT, JJ., concur.

DUNBAR, C. J., and SCOTT, J., dissent.

[No. 1050. Decided January 17, 1894.]

CAROLINE HAZELTON *et al.*, *Appellants*, v. W. H. BOGARDUS AND EMMA BOGARDUS, *Respondents*.

EXECUTORS AND ADMINISTRATORS—ACTION BY HEIR PRIOR TO DISTRIBUTION—FINAL SETTLEMENT—IRREGULAR SALE BY ADMINISTRATOR—CURATIVE ACT.

An action to quiet title cannot be maintained by an heir until after the close of the administration upon his ancestor's estate.

The approval of an administrator's final account does not determine the administration upon an estate, but the court retains jurisdiction of the estate until there has been a final settlement, and a distribution of the property, or some other act equivalent thereto.

Where an administrator's petition for the sale of land and the order of sale made thereon give such an indefinite description of the land that it cannot be located, the sale made thereunder cannot be validated by the statute curing sales of real estate by administrators (Gen. Stat., §8086).

8	102
23	236
8	102
684	312

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*Appeal from Superior Court, King County.**Hill & Gilliam*, for appellants.*Preston, Albertson & Donworth*, for respondents.

The opinion of the court was delivered by

HORT, J. — This was an action to quiet the title of the plaintiffs as against the defendants to a piece of land in King county. The court not only denied plaintiffs any relief, but, upon a cross complaint filed by the defendants, quieted their title as against the plaintiffs. The allegations of the answer and the undisputed proofs were to the effect that the administration of the estate of the deceased person as heirs of whom the plaintiffs claimed had not been terminated, and for that reason the action of the court in refusing plaintiffs any affirmative relief was correct, as it is now the settled law of this state that actions in relation to the real estate of an ancestor can only be maintained by the heir after the close of administration, unless some special circumstance appears which takes the case out of the general rule. See *Dunn v. Peterson*, 4 Wash. 170 (29 Pac. 998); *Balch v. Smith*, 4 Wash. 497 (30 Pac. 648), and cases therein cited.

Appellants seek to distinguish the case at bar from the cases above cited, as they were actions in ejectment, whereas this is one to quiet title. We are unable to see why the rule should obtain in one class of cases and not in the other. The heir cannot maintain the action of ejectment for the reason that the real estate is in the possession, actual or constructive, of the administrator, and he should not be allowed an action to quiet title for the reason that it is the duty of the administrator to take every step necessary to protect the interests of the estate. It further appears from the opinions in the cases above cited that no complete title, even of an equitable nature, descends to the

heir so as to be available to him during the progress of administration.

It is further suggested on the part of the appellants that since the administration had proceeded so far that the final account of the administrator had been approved, it should be held to have been terminated. Such effect cannot be given to the act of approving what purports to be a final account. The case of *Weyer v. Watt*, 48 Ohio St. 545 (28 N. E. 670), is directly in point, and the reasoning and conclusions therein satisfactory. They were to the effect that the approval of such final account does not determine the administration. To a like effect are the California cases. Until there has been a final settlement of the estate and a distribution of the property, or some other act equivalent thereto, the jurisdiction of the probate court over the estate has not been terminated.

The basis of defendants' prayer for affirmative relief was certain proceedings of the probate court culminating in a sale of the property to them. Appellants attack these proceedings on several grounds. It will only be necessary for us to discuss one of them, for the reason that in the case of *Ackerson v. Orchard*, decided by this court December 13, 1893, 7 Wash. 377 (34 Pac. 1106), proceedings for the sale of real estate fully as defective as these, excepting as to the question to be hereafter considered, were upheld, and a sale made thereunder sustained.

The question not decided by that case grows out of the insufficiency of the description of the land in the petition for the sale thereof and in the order of sale made thereon. In such petition and order the land was described as being in section 24, township 29 north, of range 3 east, whereas the land advertised and sold by virtue of such order was in township 25 north. The proof offered on the trial showed that the land intended to be described in such petition and order was the same as that advertised and sold, and the

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question presented for our decision is as to the effect of such explanation. If the description in the petition and order had been such as to indicate any certain piece of land, it is possible that they would have furnished authority for selling the land in question, though situated in another township, upon such showing, if it further appeared from the circumstances disclosed by the proofs that the parties interested could not have been misled by the mistake. But here the attempted description is in fact no description at all, for the reason that in connection with the statement that the land was in township 29 north, was the further statement that it was in King county, in which said township is not situated. It follows that the description can only be made to apply to any certain piece of land by rejecting a portion thereof as surplusage, and that there is nothing to indicate the portion to be thus rejected. The petition and order can have no greater force than they would have had if there had been no attempt to describe any particular piece of land.

Under our system for the administration of estates it is probable that the legislature could dispense with most of the forms prescribed for proceedings to sell real property, but until it has done so, it must be held that at least a petition and an order of sale which substantially describe the property are necessary to pass the title. The curative statute (Gen. Stat., § 3066), relied upon by respondents may be held to have made titles under probate sales good without any petition, but that fact will not aid these proceedings, as such curative act only validates titles where, among other things, an order for the sale of the property had been made by the court, and in legal effect no order had been made for the sale of this land.

The judgment must be reversed, and the cause remanded with instructions to dismiss the action.

STILES, ANDERS and SCOTT, JJ., concur.

DUNBAR, C. J., concurs in the result.

[No. 1061. Decided January 19, 1894.]

ANDERSON D. TRYON, *Respondent*, v. R. F. DAVIS, *Appellant*.

LANDLORD AND TENANT—LEASE BY ONE SPOUSE OF COMMUNITY LAND—RESCISSION BY LESSEE—ACTION FOR RENT—DEFENSES—EVIDENCE.

Before a lessee can elect to rescind a lease of community real estate, which has been executed by but one of the spouses, he must give the contracting party an opportunity to furnish a contract legally executed.

In an action upon such a lease to recover rent, an answer setting up that defendant "notified the plaintiff of the defect in said lease and that he would no longer hold or occupy said premises under the same, and that he was ready then and there to surrender to the plaintiff possession of said premises or to pay him a reasonable rental for the use and occupation of the same from month to month while occupying the same," is not sufficient to constitute a defense.

Neither under such affirmative defense nor under the general issue is evidence admissible that defendant notified plaintiff's agent for the collection of rent that the lease was void and that defendant would no longer occupy the premises under it.

In an action to recover rent under the terms of a lease, proof of the lessor's ownership of the premises is unnecessary.

Appeal from Superior Court, Spokane County.

Thomas C. Griffiths, for appellant.

Post & Avery, and *R. B. Blake*, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—This is an action brought by respondent for the recovery of money alleged to be due on a lease. On the 1st day of July, 1889, appellant and respondent entered into an agreement in writing, whereby respondent leased to appellant, for the term of five years from said date, certain real estate in the city of Spokane, at an agreed monthly rental of \$200, payable in advance. The appel-

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lant entered into possession of the premises under said lease and continued to pay the stipulated rental until July 1, 1891; at which time it is claimed by the appellant that he discovered that the lease under which he held possession was void by reason of the fact that the property leased was community property, and that the wife of the respondent had not joined in executing the lease; at which time appellant insisted that he would either abandon the lease or pay a reasonable value for the use of the premises from that time.

It is conceded that respondent and his wife were not residents of the State of Washington at the time the lease was executed, or at the time of the alleged discovery of the illegality of the contract.

The complaint was the ordinary complaint for the recovery of money due on a lease. The answer was a general denial of the allegations of the complaint, and an affirmative defense alleging that the respondent was a married man and setting up the lease, want of execution by the wife, and the further facts:

“*Fifth*: That on, to wit, the first day of July, 1891, the defendant discovered that said lease was illegal and void, and that he could not rely thereon, and that he had no rights thereunder; and he then and there notified the plaintiff of such defect in said lease, and that he would no longer hold or occupy the said premises under the same, and that he was ready then and there to surrender to the plaintiff possession of said premises or to pay him a reasonable rental for the use and occupation of the same from month to month while occupying the same. From, to wit, the first day of July, 1891, until, to wit, the first day of January, 1892, the defendant paid to the plaintiff and the plaintiff received from the defendant, as rental on said building, the sum of \$155 for each and every month thereof; and the reasonable rental value of the said premises for said period of time did not exceed the sum of \$125 per month.

“Sixth: That on, to wit, the first day of January, 1892, the plaintiff again leased the said premises to this defendant for the period of six months, at the monthly rental of \$125 per month. And on, to wit, the first day of July, 1892, the plaintiff again leased the said premises to this defendant for the period of eighteen months thereafter, at the monthly rental of \$100 per month for the first six months and \$125 per month for each additional month thereafter to the end of the term.

“Seventh: Defendant is now in possession of the said premises with his subtenants under and by virtue of said last named lease, and has paid each and all of the rentals so promised and agreed to be paid by him.

“Eighth: That the defendant has not occupied said premises under and by virtue of the pretended lease mentioned in the complaint since the first day of July, 1891, and since that date both plaintiff and defendant have treated said lease as void and of no effect. And defendant’s occupancy of said premises ever since said first day of July, 1891, has been as herein stated and not otherwise, and plaintiff acquiesced therein and consented thereto.”

At the conclusion of plaintiff’s testimony defendant moved for a non-suit by reason that the evidence showed affirmatively that from July 1, 1891, to January 1, 1892, defendant occupied the premises under a different arrangement from the original lease, and that plaintiff generally had failed to prove his complaint because the ownership of the property had not been proven, and that under the allegations of the answer the lease was void. Had this motion been made before the cross examination of witness Davis, it is possible that it might have been sustained; but whatever failure of proof there was on the direct examination with reference to the occupancy of the premises from July 1, 1891, to January 1, 1892, was supplied by the appellant Davis on his cross examination; for, in view of the law as pronounced by this court, the appellant by his own testimony plainly shows that he was in possession of the

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premises during that period under the lease, and not by virtue of any new arrangement. It is nowhere testified to by him that he demanded the execution of a new lease by respondent and his wife, on the same terms as the old one. His testimony shows that instead of doing this he informed the agents of the respondent that he would not occupy the premises at all unless a new lease embodying different terms was executed, and that he told said agents that until such time as said new lease could be executed (the respondent being a resident of New York), he would continue in possession of the premises and pay a reasonable rental therefor.

Conceding for the purposes of this case that, under the circumstances, the property was community property, and that the tenant had any right to dispute the title of his landlord, he has not brought himself within the law as laid down by this court in *Isaacs v. Holland*, 4 Wash. 54 (29 Pac. 976); *Colcord v. Leddy*, 4 Wash. 791 (31 Pac. 320), and *Hunt v. Stearns*, 5 Wash. 167 (31 Pac. 468). There it was held that before a party could elect to rescind a contract which under the laws should be executed by both husband and wife, but which had actually been executed by but one of the spouses, he must give the contracting party an opportunity to furnish a contract legally executed.

So far as the contention of appellant is concerned, that plaintiff failed to prove ownership, it is without merit, for the proof of ownership was not necessary.

Neither was there any proof whatever tending to show that the arrangement which appellant alleges he had entered into with regard to the occupancy of these premises between July 1, 1891, and January 1, 1892, was ever brought to the attention of, or agreed to by, the respondent. All such arrangements, or agreements for such arrangements, were made with the agents of respondent, who

were simply agents for the collection of the rent and did not claim any other authority, and it is not claimed by appellant in his testimony that they ever held themselves out as claiming any authority to contract for their principal.

On the refusal of the court to grant the non-suit asked by appellant, this question was asked of one of the alleged agents:

“Q. When did Mr. Davis first notify you that the lease that he obtained on July 1, 1889, was void, and that he would no longer occupy the property under it, if at all?”

This was objected to by counsel for the plaintiff, for the reason that it was leading, and for the further reason that no allegations in the affirmative defense justified such proof; that the affirmative proof set up in the answer did not constitute a defense in law, and that it did not appear that this witness was an agent of Mr. Tryon for the purpose of receiving any such notice or information. Some other questions were asked by the counsel for the defense which were objected to. Finally the court ruled that the affirmative matter in the answer did not constitute facts sufficient to constitute a defense. Counsel then asked the question under the general issue—

“Mr. Galbraith, at any time while you were collecting rents, did Mr. Davis say anything to you with reference to the validity of the lease under which he had been theretofore paying rent?”

Objected to as irrelevant and immaterial to any issue in the case. Objection was sustained.

We think the objection was properly sustained for the reason that it was irrelevant, and we are also of the opinion that under the construction placed by this court upon the law respecting cases of this kind, in the cases above cited, the answer failed to state any affirmative defense. It alleges that he “notified the plaintiff of the defect in said

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lease, and that he would no longer hold or occupy said premises under the same, and that he was ready then and there to surrender to the plaintiff possession of said premises, or to pay him a reasonable rental for the use and occupation of the same from month to month while occupying the same.” And, as we have before said, under the decisions of this court, he had no right to rescind this contract until he had given the appellant an opportunity to execute a legal lease.

The allegations in section 6 of the answer are entirely irrelevant, and if they were confessed would be no defense to an action for money due for rent before that date. So far as subdivisions 7 and 8 of the answer are concerned, if they are not the statements of legal conclusions but are intended to be the statement of facts, they are in plain conflict with the testimony of Davis himself, who, being a party to the action, should not be allowed to dispute or impeach his own evidence. Hence, in no event could the ruling of the court upon the insufficiency of the affirmative allegations of the answer be prejudicial to the appellant.

Finding no substantial error, the judgment will be affirmed.

STILES, SCOTT, ANDERS and HOYT, JJ., concur.

[No. 900. Decided January 22, 1894.]

P. S. WILKES, *Appellant*, v. GRIFFITH DAVIES, *Respondent*.

SALE OF SCHOOL LANDS—RECOVERY OF VALUE OF IMPROVEMENTS—
RES JUDICATA—JUDICIAL NOTICE.

Where school lands have been improved by a tenant, and the land afterward appraised by the county commissioners and offered for sale, no appraisalment of the improvements having been made, the tenant is entitled to the value of his improvements upon the sale of the land, and may recover therefor, although still in possession. (HOYT, J., dissents.)

The decision of the supreme court construing a statute, whether proper or not, is the law of the case in another action between the same parties, upon the same subject matter. (HOYT, J., dissents.)

Where the state of the pleadings is such that the plea of *res judicata* cannot be interposed, and there is no opportunity to raise the point on the introduction of evidence, the court may, where both causes are matters of record in the court, take judicial notice thereof. (HOYT, J., dissents.)

Appeal from Superior Court, King County.

W. S. Relfe, for appellant.

Fishback, Elder & Hardin, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—This was an action at law to recover the alleged value of improvements on school land. The plaintiff alleged his possession of said lands by virtue of a lease from the county commissioners of King county; the appraisalment of the land by the county commissioners, under the act to provide for the sale and leasing of school lands, approved March 28, 1890 (Laws 1889–90, p. 438), and all the subsequent steps taken by the commissioners under said law. He alleged that the defendant Davies was the highest and best bidder for the land upon which

8 112
13 665

8 112
15 358

8 112
20 592

8 112
32 868

8 112
34 198
34 880

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the plaintiff's improvements rested, and alleges that in appraising said lands the county commissioners of King county, although at the time having full knowledge and notice of the fact that plaintiff had improvements thereon and of their value, and that the plaintiff was the owner of said improvements and living thereon, arbitrarily and without just cause, failed and refused to appraise or value the improvements made by the plaintiff as aforesaid upon the land, and failed and refused to set down the value of said improvements upon the land so appraised, and to report the same as required by law. The complaint also alleged the value of the improvements and asked for judgment for that amount.

The complaint is a long one, but we think we have stated sufficient of it for the purposes of this decision. Upon the trial of the cause the defendant objected to the introduction of any testimony by the plaintiff, for the reason that the complaint did not state a cause of action. The court sustained the motion, and the plaintiff, standing on his complaint, appeals. So that the only question before the court is the sufficiency of the complaint.

The first and main contention for the respondent is, that the plaintiff being in possession of the improvements, not having delivered them to defendant, he could not recover their value from defendant. We cannot agree with this contention of respondent. We think the law accords to him, without any question or peradventure, the value of his improvements upon the sale of the land, and that he should not be compelled to yield up possession and depend upon a personal judgment, which might prove inadequate or entirely worthless. Neither do we think the law will compel him to remain upon the land awaiting the pleasure of the purchaser to take possession of the premises and the improvements.

There is another proposition in the case, however, that

is vastly more troublesome, namely, whether or not the appellant is precluded by the action of the county commissioners in reporting no improvements upon the land, and what appellant's remedies and rights are under such circumstances, if he have any. Although the court entertains grave doubts upon these propositions, yet we think it is unnecessary to determine them in this case. Substantially this same case was before the court, and this statute (Gen. Stat., title 24, ch. 1) was construed, in *Wilkes v. Hunt, Griffith Davies, F. A. Twitcheil and W. T. Forrest*, reported in 4 Wash. 100. In discussing the statute now under consideration, the court, in its opinion rendered in that case, said:

“To maintain injunction against anyone the plaintiff must make sure that he has not some other adequate remedy, and this is none the less the rule when an officer of the state is the person sought to be enjoined, and the object of the injunction is to prevent his performing a statutory duty. In this case the appellant shows that there was no appraisal of his improvements, and that, therefore, the purchasers from the state will take title to the land without paying him for their value, as the statute says he shall do within thirty days. Were we clear that such results would follow we should feel inclined to reverse the judgment, since it is plain that the intention of the statute is to reimburse persons situated as the appellant avers himself to be. But he seems to have not only one, but even two other remedies, either of which would save him harmless. In the first place, if there has been no compliance with the statute by the appraisal of his improvements, certainly no court would permit a purchaser under those circumstances to interfere with his possession of the land until he is compensated as the law requires. Secondly, the purchaser is required to pay the appraised value to the owner of the improvements; that is, he is the debtor of the owner to that amount, and must pay it within thirty days. He can be sued for the debt, and if there has been no appraisal, the court and a jury can fix the reasonable value as well as the commissioners. With such a wealth of reme-

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dies at his hand we think the state should be permitted to proceed with its business without the hindrance of an injunction, and the judgment is, therefore, affirmed."

By reference to the record in the case of *Wilkes v. Hunt*, 4 Wash. 100 (29 Pac. 830), it will be seen that the parties in interest in that case were the identical parties in interest in this action, it being alleged in that action that Hunt was the agent for Davies, the defendant in the action at bar, in bidding in the land. That action was against both Hunt and Davies. It is true that the land commissioners were necessarily made parties defendant to the action, but it was equally true that they were not the parties in interest, and under the theory of the plaintiff in that action it was necessary that the commissioners should be made a vehicle to convey him into court to obtain an adjudication of his right with Hunt and Davies. That adjudication could only affect the parties in interest, namely, Wilkes on the one side and Hunt and Davies on the other. Afterwards Davies was substituted for Hunt as the purchaser, so that it will be seen that the parties to this suit were the parties to that.

The next question is, was the subject matter of the litigation the same. The object of the first action was to obtain the value of the improvements on the land by enjoining the sale until such improvements were paid for. The avowed object of this action is to obtain the value of the same improvements. The complaints in both actions are the same; the same state of facts is alleged, and by referring to appellant's brief in the former action, the respondent not appearing, it will be seen that the injunctive relief there sought was sought on the theory that no legal relief was available. We quote from appellant's argument, on page 23 of the brief:

"Since the title to the land would pass to the purchaser from the state by this contract and patent, if delivered, the plaintiff having only the right to be paid the appraised

value of his improvements, he could interpose no defense to an action by the purchaser to recover possession of the lands and improvements. He could not recover the value of his improvements from the state, nor could he compel the purchaser to pay for them, for the reason that no valuation had been placed upon them by the commissioners. How then can he be protected except by injunction?"

So that it will be seen that the very question raised by the respondent in this case, namely, that the complaint did not state facts sufficient to constitute a cause of action, was before the court in that case, and one of the grounds alleged by the court for refusing the equitable relief asked for, was the ground that the plaintiff was entitled to the relief asked for in this action. So that the question involved here was directly before the court and passed upon by the court in *Wilkes v. Hunt*, and the court in its opinion plainly states that the judgment in that case was based upon its construction of the statute on the questions raised in the case now before the court; and while it may be that the case might have been decided on some other ground, these questions were involved in the case, were considered and decided by this court, and such consideration and decision on these points, decided the former case. So says this court in its opinion. This was in no sense *obiter dictum*, but was the decision on one of the points involved in the case.

The plaintiff in this action, relying upon the rule laid down by the court, has brought himself squarely within it, and the decision of this court, whether right or wrong, must bind the parties to the action in which it was rendered, and becomes the law of the case. Whether or not the judgment in the former case was *res adjudicata* so far as the public is concerned in the way of a precedent, it is not necessary to determine, for there is a well defined distinction between the doctrine of *res adjudicata* in that sense

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and the doctrine of *res adjudicata* in its application exclusively to the parties to the action. The general rule is, that the judgment of a competent court is binding and conclusive upon the parties, and will not be reversed or reviewed by any court possessing concurrent jurisdiction. It is not only binding and conclusive as to all questions of law and fact that were made upon the first trial, but as to all questions of law and fact which, from the organization and powers of the court, might have been submitted. Wells on *Res Adjudicata* and *Stare Decisis*, § 424.

In *Davidson v. Dallas*, 15 Cal. 75, the court, in referring to a case which had been before it and had been decided at a previous trial, says:

“This view of the case is conclusive of this appeal. The same facts are brought before the court now as when the case was heard and decided here. The agreement was before the court between Dallas and Gilson, and the effect of it was passed upon.”

In *Thomason v. Dill*, 34 Ala. 175, it was decided that a decision of the supreme court is the law of the case in which it was announced, and is conclusive both in the primary court and on a second appeal; and by the supreme court of Indiana, in *Harley, Administrator, v. Smith, Administrator*, 45 Ind. 183:

“When the supreme court has laid down a rule of law, it will adhere to it in a subsequent action between the same parties, where a different decision would leave one party without remedy, even though doubtful of the correctness of the rule when applied to other cases.”

In *Stacy v. Vermont Central R. R. Co.*, 32 Vt. 551, the rule was announced that the supreme court would not revise a former decision made by the same court in the same cause and on substantially the same state of facts. Said the court:

“Upon carefully examining the original bill of exceptions that was then before the court, and comparing it

with the one now before us, we are wholly unable to discover in this case any fact material to its determination that was not contained in that. The facts are stated with more particularity now than then, but substantially they are the same. We find no such alteration of, or addition to, the facts, as calls for the application of any different rules of law from what the case then required.”

And so with the cases under consideration. The complaints are substantially identical, and consequently call for the application of no different rules of law or modes of construction. This rule is so obviously based upon the plainest principles of justice and fair dealing that it has been decided by the supreme court of the United States in *Washington Bridge Co. v. Stewart*, 3 How. 413, that after a case has been decided on its merits and remanded to the court below, and is again brought up on a second appeal, it is then too late to allege even that the court had no jurisdiction to try the first appeal; virtually holding as the law of the case a decision of a court without jurisdiction. This case has been followed by the appellate courts in many of the states.

In *Clary v. Hoagland*, 6 Cal. 685, it was decided that when a case has been once taken to an appellate court and its judgment obtained on the points of law involved, such judgment, however erroneous, becomes the law of the case; and that this rule applies not only to questions of law arising out of the case, but to questions of jurisdiction. And while the case at bar was not brought here on appeal directly as a matter of record the second time, yet in fact and in effect it is here for all the purposes of the case exactly as though it were brought here on a second appeal.

Dugan v. Hollins, 13 Md. 149, is a case where the parties to the second action were not nominally the parties to the first action; but the same questions were adjudicated in both cases, and the same law points involved, just as in the

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action at bar, and it is a case in point so far as parties to the action are concerned. There the court said:

“The present defendants . . . were the plaintiffs in the suit against Coonan, reported in 9 Gill, 62. That case, *in form*, was an action of *assumpsit*, to recover rent for the house now in dispute, but in *reality* was designed to obtain a decision upon the title to the property under the will of Cumberland Dugan, sr. This is evident from the admission stated on page 66.”

Analogous to this, the case of *Wilkes v. Hunt* was in form an equitable proceeding, but it was in reality designed to obtain a construction of the statute in relation to the rights of owners of improvements on school land.

Quoting again from *Dugan v. Hollins*, the court said:

“As regards the effect or influence of the former decision upon the present case, it will be seen to be quite immaterial whether it shall be considered as an estoppel or as a decision by the court of last resort, giving an interpretation to the clauses in the will of Cumberland Dugan, sr., in relation to the same property now in dispute, and where the same question arises, which was before decided.”

And so we say again that the decision in the case of *Wilkes v. Hunt* was an interpretation of the clauses in the statute with reference to improvements on school land, and in relation to the particular improvements now in dispute; and that the same questions arise in the case at bar which were before decided; and we again adopt the language of the court in that case and apply it to the case at bar when we say “the same property, the same statute and the same questions arising upon similar facts which were presented in the former case are also before us in this.” We therefore think the following quotation from *Hammond's Lessee v. Inloes*, 4 Md. 138, would constitute a very appropriate closing for us:

“We have not been able to discover a sufficient reason for making this an exception to the almost uninterrupted

practice of all courts, of receiving their own decisions as of binding force.”

In the appeal of Thomson and others in the case of *Winn v. Albert*, 15 Md. 268, the court decided that where the court of appeal has declared a deed of trust for the benefit of creditors to be void, that decision is the law of the case and must govern in all further proceedings in the same case, notwithstanding a different decision upon a similar deed may have been subsequently made by the court in another case. And this also was a case where the parties to the last action were not, in form, parties to the action in the former case.

Such also was the condition in the case of *Eugene Tuttle v. Orrin Garrett et al.*, 74 Ill. 444. The parties to the action, the decision of which was held to be *stare decisis*, were John G. Tuttle et al., plaintiff in error, v. Augustus O. Garrett, defendant in error; but the court held in the latter case that it was substantially the same case, and that the court was concluded by its decision in the former case.

The supreme court of the United States, in *Aurora City v. West*, 7 Wall. 82, lays down the rule as follows:

“Courts of justice, in stating the rule, do not always employ the same language; but where every objection urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit, and might have been presented in that trial, the matter must be considered as having passed *in rem judicatum*, and the former judgment in such a case is conclusive between the parties. Except in special cases, the plea of *res judicata*; says TAYLOR, applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

And referring to *Packet Co. v. Sickles*, 24 How. 341, the court said:

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“Attempt was made in that case, as in this, to maintain that the judgment in the first suit could not be held to be an estoppel, unless it was shown by the record that the very point in controversy was distinctly presented by an issue, and that it was explicitly found by the jury; but the court held otherwise.”

It seems to us that this high authority is decisive of the case at bar, for if the contention of the respondent in this cause in regard to the construction of the statute is correct, it would have been a complete answer to the complaint in the former action. It is true that the plea of *res adjudicata* was not presented by the pleadings, nor was it offered in proof under the general issue, which are the two ordinary ways of bringing this question to the notice of the court.

But this case falls within the rule laid down by many courts where no opportunity to plead the former adjudication is presented. The plaintiff brought his action in accordance with his legal rights as pronounced by this court. He could not very well plead an estoppel in his complaint. The defendant answered, but his answer was a denial of the facts alleged in the complaint. No question of law was raised by the answer to render the plea of an estoppel necessary by reply. It denied that the plaintiff had the improvements which he alleged he had; denied that he lived on the land or that he was in possession of the land as averred in the complaint; denied that the lands were advertised for sale as alleged; denied that either the defendant or his assigns were claiming the right to take plaintiff's improvements without compensation; but averred that all the plaintiff's improvements had been duly and regularly appraised, and compensation made therefor in the sum of \$600, and that plaintiff had accepted and received said sum.

There was much more to the same effect in the answer,

but it only put in issue questions of fact, and informed the plaintiff that these facts must be substantiated by proof. This court had not passed upon any question of fact in the case. If it had, such decision could have been pleaded as *res adjudicata* to the answer. But there was certainly no opportunity to plead *res adjudicata* of any decision of the court on the law involved. Neither was there any opportunity to offer such a plea in evidence, even if it had been admissible to have done more than to have cited the court to the decision; for the case was really disposed of on demurrer, or a motion which was equivalent to a demurrer to the complaint; for after the jury was empaneled the defendant objected to the introduction of *any* evidence, on the ground that the complaint did not state facts sufficient to constitute a cause of action, and the plaintiff was deprived of the right to introduce evidence of any kind by the action of the court in sustaining the motion. But, in any event, this objection was not raised here, and we will not raise it for the parties. Both cases are matters of record in this court, and the court can take judicial notice of its own records.

But further it was made a direct issue by the brief of appellant in this court, and is the only matter which is discussed in the brief. No objection was made in the respondent's answering brief to the consideration of this question, or in oral argument to its discussion. In fact, it was claimed by respondent in his brief that the case of *Wilkes v. Hunt* was *res adjudicata*, to the effect that the plaintiff could not hold possession of the land and at the same time recover its value in a suit at law. Both parties, therefore, conceded it to be *res adjudicata* and treated it as such, but placed different constructions upon the decision.

In consideration of the importance of this statute in its effect upon the public, and of the doubt that is at present in the minds of the court as to whether the construction

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placed upon it in *Wilkes v. Hunt* was the proper construction, we will not pass upon that question now, nor consider ourselves bound by it in any independent cases; but having so construed the statute in a case in which the identical parties to this action were the parties in interest, and the identical property here involved was involved, so far as this case is concerned we feel ourselves bound by the decision therein rendered and by the opinion therein expressed; and on this ground the judgment will be reversed, and the case remanded to the lower court with instructions to proceed in accordance with this opinion.

STILES, SCOTT and ANDERS, JJ., concur.

HOYT, J. (*dissenting*).—I am unable to agree with the conclusions of the majority as stated in the foregoing opinion, and, as I deem the questions discussed therein of great importance, shall at some length state the reasons which induce me to dissent therefrom.

Such conclusions are founded entirely upon the alleged fact that what was said by this court in the case of *Wilkes v. Hunt* was conclusive of the rights of the parties in the case at bar. If these conclusions had been put upon the ground that what was thus said had become a rule of decision for all cases presenting a similar state of facts, I should find little fault with the reasoning of the court in regard thereto. But it clearly appears from the opinion that they were not at all founded upon such rule. It appears from inferences to be drawn from the course of the discussion in the opinion, and also by express announcement therein, that what was said in that case will not be considered as the settled law of the state; that owing to the importance of the questions involved the court will not now decide anything in regard thereto, but will hold them open for further investigation. What was said in that case is not applied to this for the reason that it is now thought

to be the law in this state, settled or unsettled, but is so applied solely on account of the alleged substantial identity of the parties and of the subject matter in the two cases. By reason of such identity it is argued that what was said in the former had become the law of this case, or a matter *res adjudicata* as between the parties thereto. This makes it necessary that the principles underlying those questions which are technically termed "the law of the case," "*res adjudicata*," and "*stare decisis*," should be considered and their application pointed out.

As I understand these matters "the law of the case" is a rule of law announced by a court in the particular case under consideration. The question as to its application most frequently arises in a case which has been before an appellate court, and certain rules of law applicable thereto announced by that court and the cause remanded for a new trial. In such a case the law as laid down upon the first appeal will be held to be the law of the case on the second appeal, and will be adhered to by the court without any investigation as to whether or not the court is then satisfied with the law as so laid down. After a somewhat extended investigation I have been unable to find that the rule of "the law of the case" has ever been applied except as to questions thus decided. It may be possible that some courts have in some particular case applied the law established in one case in another not technically the same, but it will be found that it was substantially identical with the one in which the rule was laid down. That is said to be "*res adjudicata*" as between the parties to an action when it appears that a court of competent jurisdiction has passed upon it in a case where the parties and the facts were substantially the same. A question thus decided is conclusive upon the parties, and whether or not it was correctly ruled, they must abide by the decision. A legal principle is said to be "*stare decisis*" when it is so established by the rul-

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ings of a court that it feels bound thereby and will not further investigate the question as to its correctness.

The line of distinction between these several principles is clear and distinct, and founded on reason and authority. That such is the fact will sufficiently appear from the cases cited in the foregoing opinion. They are so cited for the apparent purpose of showing that there is no such well defined distinction, and that what would come within the rule of "*stare decisis*," as above defined, may be applied as "the law of the case" or as "*res adjudicata*" between the parties to the action. I am unable to gather any such doctrine from such cases. All excepting four may be grouped together, and the most careful reading of the entire group will fail to show that in any of them is any other question decided than that a rule of law laid down by a court in a particular case will be adhered to as the law of that identical case when it again comes before the court.

The four cases cited not included in the above group will now be considered. *Hammond's Lessee v. Inloes*, 4 Md. 138, refers entirely to the rule of *stare decisis*, and simply holds that when an appellate court has, upon careful consideration, announced a certain rule of law as applicable to a certain state of facts, it should adhere to that rule in another case presenting the same state of facts, unless it is satisfied that the decision is wrong. As I understand the facts of this case there was much better reason for the application of the rule of "the law of the case," or *res adjudicata*, than in the case at bar, but the court refused to found its decision upon either of these principles.

In the case of *Dugan v. Hollins*, 13 Md. 149, the court held that where it had once decided as to the force of a law with reference to the title to certain property, and the same law in reference to the same property was brought up for consideration upon the same question in another suit, the former decision would be adhered to, whether the

judgment be technically an estoppel or not, unless there is manifest error therein. It will be seen that in this case the court announced the doctrine that it would adhere to its former decision even where the parties were not identical unless it was satisfied that such decision was erroneous, but there is no intimation in the opinion that the court would hold the parties to that action bound by the decision should it be overruled in its application to other cases. It clearly appears from the opinion that the court refused to decide as to whether or not the former decision was rendered under such circumstances as to bind the parties in the case under consideration.

In *Hawley, Administrator, v. Smith, Administrator*, 45 Ind. 183, the court held a rule of law which had been announced in a former case to be binding upon the court in that one, whether or not said rule of law would, upon a further consideration, be found to be correct. But the facts of the case show clearly that in so holding it applied the rule of "*res adjudicata*" as above set out. The language of the court is as follows:

"It having been held in the former action between the same parties, on the same cause of action, that the relation of principal and agent existed, we should regard the question as *res adjudicata* between the parties. This should be the rule, even if we doubted the correctness of the ruling when applied to other cases."

The case of *Aurora City v. West*, 7 Wall. 82, only applies the rule of "*res adjudicata*" as between the parties to the action in relation to the same subject matter, but extends the doctrine to questions which might have been adjudicated in the former suit as well as to those which were actually so adjudicated. This extension can have no influence in deciding the case at bar, and was only the announcement of what had been held by many of the courts, though Justice MILLER, in his dissenting opinion, gives

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reasons which, to me, are satisfactory why the rule should not be so extended.

These are all of the cases cited, and I can gather nothing therefrom that in any manner tends to extend the rule of "the law of the case," *res adjudicata* or *stare decisis*, so as to warrant their being in any manner intermingled, or applied to cases except as above stated.

I will now proceed to examine the decision in the case of *Wilkes v. Hunt*, 4 Wash. 100 (29 Pac. 830), as related to this case, and state my reasons for holding that, if the case at bar is to be at all affected by that decision, it must be because it is *stare decisis* in this court, and not for the reason that it is "the law of the case" or *res adjudicata* in any sense. That it is not the law of the case is too well established by the principles hereinbefore announced and by the cases bearing thereon cited by the majority to need further discussion. The case in which that decision was announced was in no sense this case. It was between different parties and related to an entirely different subject matter; for while, except for the reason to be hereinafter stated, there may be something in the facts which would justify the statement of the majority, that the ultimate object sought by the plaintiff in that case was the same as the ultimate object sought in this, yet the immediate objects of the suits were entirely different. In the former case the only object was to prevent a sale of the land being consummated as between the state and the purchaser at the sale. Under the complaint therein the court had no jurisdiction whatever to, in any manner, render a judgment in favor of the plaintiff for the value of his improvements, as appraised or to be appraised. The only thing which he sought was to have the hands of the officers of the land department stayed. There is no intimation in his complaint, or in any part of the proceedings, that he seeks any express relief as against the defendant in this action. It is

nowhere suggested that in the proceedings there should be an appraisement ordered, and, upon such appraisement being had, the purchaser at the sale adjudged to pay the amount thereof to the plaintiff. Nor does it in any manner appear therefrom that the injunctive relief is auxiliary to any other relief to which he may be entitled. While in the case at bar the only thing sought is to recover, in an action at law, the value of his improvements. If, in the former case, he had brought his action to recover for such improvements, and had, as auxiliary thereto, sought to stay the hands of the land department from completing the contract of sale, there would be some ground for the contention that the two suits were as to the same subject matter, but such was not the fact; and the assertion of the majority of the court, that the only object of the former suit was to secure the payment to the plaintiff for his improvements, is in no manner founded upon the records in that case, but entirely upon a loose statement in the brief of the plaintiff. It in no manner appears from said record that the plaintiff would have been satisfied to submit the question of the value of his improvements to a jury. The gravamen of his complaint is, that he was entitled to have them appraised under the statute, and that until they had been so appraised the sale should not be consummated.

In my opinion the subject matter of the two cases was in no legal sense the same, and for that reason the decision in the first case could not be *res adjudicata* in the latter one. But if it were, the parties were not so identical as to warrant the application of that rule. It is true that, so far as any pecuniary interest was concerned, the defendant in this action was the substantial party in the former one, but when we take into consideration the object of that suit and the parties at the hands of whom the relief was asked, and also consider the fact that the purchaser at the sale may have cared very little as to whether or not the officers

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were allowed to consummate it by the execution of the contract, it should not be held that he was the principal person against whom the plaintiff was waging that suit. For aught that appears in that case, this defendant may have been entirely content to have had the court restrain the execution of said contract. It was nowhere intimated therein that he, or his agent who made the bid for him, had acted in the premises in any manner wrongfully. All the wrongful action alleged was on the part of the officers of the land department, and they were the substantial parties to that action, and the defendant in this action was but incidentally interested therein. Under these circumstances, the responsibility of defending the action should have been and probably was cast upon the officers of the land department, and for that reason, if for no other, this defendant should not be bound by the decision rendered therein.

There is another, and to my mind conclusive, reason why the former decision could not be relied upon here as having been an adjudication which established the rights of the parties to this action. Before that rule can be invoked the former decision must in some manner be brought into the case under consideration, and as the correctness of the ruling of the lower court must be determined upon the record as presented to it, and not by anything occurring in the case subsequent thereto, I am unable to see how its decision can in any manner be affected by the former one. The transcript of the record from the lower court will be searched in vain for anything that in the most remote manner calls the attention of that court to the fact that there had ever been such a decision made by any court as that now relied upon. As I understand the rule, a court will never, for the purpose of applying a principle of law as "*res adjudicata*" in a particular case, go outside of that case to ascertain what that principle is. If a rule of law has been so established by the courts of a state as to be

“*stare decisis*” therein, it must be given effect without being specially brought into the particular case, and this must be done as well when the parties and subject matter are entirely different as when they are identical with those of the case in which the rule was announced.

But I cannot understand how it can be held that in the trial of this case in the lower court it was bound to take notice that this principle of law had been adjudicated between the parties under such circumstances as to be binding upon them in this case, without the fact of such decision, or the circumstances under which it was rendered, having been in some manner brought to the attention of that court. The rule announced would require of a trial court, not only that it should bear in mind every principle of law theretofore announced by it, and every other court of competent jurisdiction, but also to take judicial notice of all the facts in every case, and at its peril, without its attention being in any manner called thereto, decide rightfully as to the identical parties in all of the cases and the entire subject matter which was or might have been adjudicated therein. That such could not be the rule seems clear to my mind. The utmost extent to which any of the cases go is to hold that where there has been no opportunity to plead the former adjudication, it may be given in evidence under the general issue. There is no intimation in any of such cases that where the plaintiff relies upon such adjudication as the foundation for his action he should not set it up in his complaint. If he does not have to thus set it up, then the court, when it rules as to the sufficiency of such complaint, must bring to its aid an adjudication in another case of which it has no notice whatever, or else have its decision reversed by having such adjudication suggested in the appellate court.

But even if it was held that it was not necessary for such prior adjudication to be set up in the pleadings, under the

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circumstances of this case the plaintiff was not in a situation to take any advantage of such adjudication. After the intimation of the court that it thought the complaint on its face insufficient, he made no suggestion that its allegations were in any manner aided by matters not appearing therein. Not only was there no attempt in this manner to aid the complaint, but the plaintiff substantially told the lower court that he had no proof to offer upon that subject, as after the court had intimated that the complaint was insufficient, he stated to the court what he proposed to prove to establish the issues on his part, and in so doing made no reference whatever to any matter as "*res adjudicata*" between the parties.

The majority of the court have evidently seen the force of some of these suggestions, and have attempted to show that the parties here conceded that the question of *res adjudicata* was involved in the case. But even if the briefs of the parties do make such concession, that fact would not be sufficient to warrant this court in finding therefrom that the question was presented in the court below. And, unless it was so presented, this court should not allow it to influence the decision here. The transcript of the record shows clearly that nothing of the kind was relied upon in the lower court. Such being the fact, this court, if justified in acting upon any concession of counsel to the contrary, could only do so when the concession was made in such express and unmistakable terms that there could be no doubt of the intention. No suggestion by way of argument or anything of that kind should have the force of such express concession. As I understand the briefs, however, there is no claim, even on the part of appellant, that the question of *res adjudicata* was presented to the court below, or even that he relied upon it here. That there may be no misunderstanding as to the facts I here set out

the entire brief and argument of the appellant. It was in words and figures following:

“The sole question before this court is the sufficiency of the complaint.

“It was contended by counsel for defendant, at the trial, that the plaintiff being in *possession* of the improvements, not having delivered them to defendant, he could not recover their value from defendant; also that plaintiff should have appealed to the state school land commission, on the refusal of the county commissioners to appraise the improvements. The court, on its own motion, held that there having been no appraisal by the county commissioners, the sale was void and the defendant acquired no title, hence was not liable.

“This same controversy came before this court in the case of *Wilkes v. Hunt et al.*, 29 Pac. 830, in which the plaintiff sought to enjoin the execution and delivery of the contract of purchase of the lands in question, on the same theory which was adopted by the court below in this case, namely, that the failure of the county commissioners to appraise the improvements vitiated the sale. As a matter of fact, Hunt attended the sale and was the purchaser, as shown by the memoranda of the sale; but he and defendant Davies, being members of the same syndicate, Davies was, under the peculiar and loose methods of the King county commissioners, substituted for Hunt in the contract of purchase; hence the suit against Davies as purchaser.

“In the case cited, this court says, *inter alia*, ‘If there has been no compliance with the statute by the appraisal of his improvements, certainly no court would permit a purchaser, under those circumstances, to interfere with his possession of the land until he is compensated as the law requires. The same doctrine is announced in *Pearson v. Ashley*, 31 Pac. 410. Secondly, the purchaser is required to pay the appraised value to the owner of the improvements—that is, he is the debtor of the owner to that amount, and must pay it within thirty days. He can be sued for the debt, and *if there has been no appraisal, the court and a jury can fix the reasonable value as well as the commissioners.*’

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“Relying on this as an announcement from the highest authority, the plaintiff brought his suit. The superior court for King county reversed the decision of the supreme court and dismissed his case. Having lost his right to an injunction, by reason of the fact that he had a legal remedy, and having been denied a legal remedy because of his right to an injunction, he, although somewhat bewildered, confidently appeals to this court for an adjustment of his rights in the premises, and for a reversal of the decision of the court below.”

It will be seen from an examination of such brief that, while it cites our former decision as an authority, it nowhere suggests that it was made under such circumstances as to make it conclusive of the rights of the parties in this action. The only expression in the most remote degree justifying the contention on the part of the majority is in the statement that the same controversy came before this court; but if counsel had intended to place any special reliance upon the decision by reason of the identity of the subject matter and of the parties, it would have been incumbent upon him to have at least shown by the title of the case that the present defendant was a party to that suit. It can only be gathered from all that is said by appellant, that he relied upon said decision for the reason that it had been announced by this court. But such reliance can only avail him in the event that the court still adheres to the decision as having been properly ruled. This the majority of the court expressly refuse to do. They in effect say that, if this question was presented in a case where the parties were different from those in which it was decided, we would not adhere to it but would proceed to investigate further.

From the brief of respondent it clearly appears that the idea that the former decision was relied upon as “*res adjudicata*” in this case was never in the mind of the one who drew it. The case of *Wilkes v. Hunt* is cited, but there

is nothing added to the citation to show that the parties were in any manner identical with those of the case at bar, or that the decision therein was relied upon as in any way concluding their rights. It was simply cited as a case in point, as any other case involving a like principle would have been. This not only appears from what has been already said, but it further appears from the fact that later in the brief the question of *res adjudicata* is expressly presented, and the claim made that when the board of county commissioners decided that there were no improvements of value upon the land, their decision was conclusive as to plaintiff's right to recover therefor.

What was said in the former case as to the right of plaintiff to recover the value of his improvements in an action at law was not an adjudication that could conclude the parties. That matter was not before the court. What the court was called upon to adjudicate in that case was as to whether or not the plaintiff was entitled to an injunction. There was nothing set up in the complaint or anywhere in the proceedings which could in any manner authorize an adjudication by the court as to any recovery for the value of said improvements. What was said in relation thereto was only the stating of a reason why the injunction should not be granted. Such reason may not have been a good one and yet the decision entirely correct. If, for any other reason founded upon the record, the injunction was properly refused, then the decision was right, even although one or a dozen faulty reasons were given therefor. The court was not called upon to say what was the remedy of the plaintiff. The most, under any circumstances, it could properly adjudicate was that he had a remedy, and it was not called upon to adjudicate that fact to warrant the decision made, if, regardless of the question of remedy, he was not entitled to the injunction.

There is another reason why what was said in that case

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should not conclude the parties to this. There is nothing to show that the improvements referred to in the two cases are the same. In the first case it is alleged that the improvements are upon a certain forty acre tract, and there is no direct averment that any portion thereof are upon the particular twenty acres of said tract to which the complaint in this action is confined.

For the foregoing reasons I do not think that what was said in that case should be given any conclusive force in this one. But if all that was so said is given full force, the contention of appellant is not aided. It cannot be fairly deduced therefrom that the court intended to hold that the owner of improvements, without surrendering possession thereof to the purchaser at the sale, could maintain an action against him for the value of such improvements. The most that can be claimed is that it was there held that the plaintiff had one of two remedies; he could remain in possession of his improvements until compensated therefor, or surrender the possession to the purchaser and maintain his action for their value. I cannot believe that the court intended to hold that, by making a bid for school land and accepting a contract therefor, the purchaser becomes at once liable to one having improvements thereon for the value thereof, where there had been no appraisalment by the board of county commissioners and nothing placed of record to show in any manner that there are any improvements on the land. Such a construction would compel a purchaser of such lands to settle with the owner of the improvements upon whatever terms he should dictate or be put to the expense of a law suit, in which he was sure to have the costs of both parties to pay. A brief consideration of the facts as applied to such ruling will show that such results must follow.

If, at the time plaintiff brought his action in this case, the defendant was liable for the value of such improve-

ments, he must have made himself so liable by making the bid or in accepting the contract from the state, for no other acts of his are alleged which could in any manner tend to establish such liability. It will follow, that one in possession of improvements would have a direct interest in not having them appraised by the board of county commissioners. If not so appraised he can get the value thereof at the time the land is sold, as found by a jury of his neighbors, and can have the beneficial enjoyment thereof while he is prosecuting his action for such value, and while, after the recovery of his judgment therein, the purchaser is waging his action of ejectment to obtain possession of the improvements for which a judgment has been theretofore rendered against him. Not only will he have the right to do this, but during the time of his beneficial enjoyment of the improvements he may make such use thereof as to absolutely destroy their value to one who afterwards comes into possession of the land.

When a construction will lead to such hardships to the purchaser and to the state, some other should be adopted if possible. As to the construction of the statute, it seems to me there can be little difference of opinion. This court has already announced, what is undoubtedly the law, that the one in possession of such improvements had, at the date of the passage of the act, no vested right to compensation therefor. Therefore the measure of his rights must be found in the statute, an investigation of which will show that it is only to have the improvements appraised by the board of county commissioners, and when appraised, to have the purchaser pay to him the value thereof as so appraised. There is nowhere in the act an intimation that he shall have any right to recover, or anybody shall be in any manner liable to him for the value of such improvements, excepting as so appraised. It must follow that, until there has been such an appraisal, there can be no foundation

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for his recovery of anything on account of such improvements. He can assert no rights to such improvements or their value except in accordance with the provisions of the statute. The board of county commissioners will be presumed to have done their duty in that regard unless the contrary appears, and as they are charged with that duty and as he has no right to his improvements excepting such as grow out of their action in that regard, it is possible that he has no remedy when they refuse to make an appraisement thereof except an appeal to the board of state land commissioners. If he has any remedy aside from that, it can only be to have the board required to make such appraisement by proceedings in mandamus.

The majority of the court having expressly refused to say what the rights of the parties would be under the statute, I have a right to assume that if they did they would decide as above suggested. It must follow that, in their opinion, what was said by this court by way of argument in deciding a case in equity, where the only object sought was to stay the hands of certain officers, and to which this defendant was only an incidental party, was sufficient to create a liability on the part of the defendant, and a right in the plaintiff to enforce such liability, without any contract existing between them and without any authority of law whatever. I cannot consent that such results shall be held to flow from what was said in the former case.

In my opinion the judgment should be affirmed.

[No. 1146. Decided January 24, 1894.]

HYMAN HARRIS, *Respondent*, v. LEROY BROOKER, *Appellant*.

PROHIBITION — WHEN LIES — AGAINST JURISDICTION OF COURT.

Prohibition will not lie unless it appears from the petition therefor that there is some threatened injury for which the petitioner has no other adequate remedy.

Objection to the jurisdiction of a court must be first raised in the court itself before it can be subjected to a writ of prohibition on the ground of want of jurisdiction.

Appeal from Superior Court, Yakima County.

Mackinnon & Murane, for appellant.

The opinion of the court was delivered by

DUNBAR, C. J.—The application for a writ of prohibition which was issued by the superior court of Yakima county against the appellant in this case is as follows:

“Hyman Harris, of North Yakima, in the county of Yakima, being first duly sworn, says: That he is the defendant in a suit now pending in the justice court of Leroy Brooker, one of the justices of the peace in and for Yakima county, State of Washington, in which Cole Brown and P. L. Zirkle are plaintiffs; and that he makes this affidavit for the purpose of procuring a writ of prohibition to be issued out of this court to the said Leroy Brooker, Cole Brown and P. L. Zirkle, to prohibit them and each of them from taking any proceedings in said case, under notice given by Leroy Brooker, justice as aforesaid, on the 8th day of July, 1893, to appear at the Wide Hollow school house on Saturday, July 15, 1893, to hear said case.

“Affiant further says that on June 9th, 1893, said action was begun before J. O. Clark, a justice of the peace residing at North Yakima, and that on the 17th day of June, the date set for the hearing of said case, defendant appeared and answered, and filed his motion for change of

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venue; that said case was accordingly transferred to the justice court of S. C. Henton, one of the justices of the peace for Yakima county, residing at North Yakima; that on or about the first day of July, 1893, the plaintiffs by their attorney filed a motion for a change of venue, and that the case was accordingly transferred to the justice court of Leroy Brooker, before whom it is now pending. Wherefore he prays," etc.

It is not necessary for the purposes of this case to determine the question whether Justice of the Peace Brooker had jurisdiction of the case, or whether the appellant had a remedy by appeal, for in our judgment the facts set forth in the petition are not sufficient to warrant the issue of the writ. It is nowhere alleged in the petition what action the court was about to take in the premises, or if the court was threatening to take any action whatever that the petitioner would be injured thereby. (A writ of prohibition will not issue unless it appears that there is some threatened injury for which the petitioner has no other adequate remedy. There is nothing to show in this petition that the respondent did not consent to the removal of the case to the court of Justice Brooker, or that he at any time objected to the jurisdiction of Brooker's court. That objection to the jurisdiction must be raised in the court to which the writ is sought to be addressed, was decided by this court in *State, ex rel. Nooksack Boom Co., v. Superior Court*, 2 Wash. 9 (25 Pac. 1007), which followed the rule laid down by the supreme court of the United States in *Smith v. Whitney*, 116 U. S. 167 (6 Sup. Ct. 570). And the return of the judge to the alternative writ shows the justice of this rule, and the injustice of allowing a court to be subjected to this writ, and to the costs following it, before it has had an opportunity to pass upon the question of jurisdiction which is assailed. The return is as follows:

"The justice court of Leroy Brooker, in and for Wide Hollow precinct, Yakima county, Washington, to whom

is directed the writ of prohibition hereto annexed, for answer to said writ do certify and return: Said court had taken no steps in said case except notifying the said parties to appear; said court not being advised on the point of his jurisdiction was of opinion that he had no jurisdiction, and had a motion been made to dismiss said action, said court would have dismissed said action, unless good authority had been produced to change the views of said court. Said Hyman Harris, nor any person for said Harris, has never appeared in the court of Leroy Brooker."

It seems to us that it is requiring very little of the petitioner to demand that he should at least bring the point of jurisdiction to the notice of the court before he asks a superior tribunal to prohibit it from exercising such jurisdiction.

The judgment of the lower court is reversed, and the cause remanded with instructions to deny the writ.

SCOTT, ANDERS, HOYT and STILES, JJ., concur.

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[No. 763. Decided January 26, 1894.]

LAURA WOLFERMAN, *Administratrix, Respondent*, v.
HARRY C. BELL *et al.*, *Appellants*.

MODIFICATION OF JUDGMENT—EXPIRATION OF TIME FOR.

After the time fixed by law, or the well established practice, a judgment which is neither void on its face, nor affected by fraud in its procurement nor want of jurisdiction, stands for absolute verity; and neither the court which rendered, nor the appellate court which has affirmed it, has jurisdiction to vacate, modify or otherwise affect it.

Appeal from Superior Court, Spokane County.

On petition for the modification of the judgment heretofore rendered in the supreme court in this cause.

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Turner, Graves & McKinstry, J. R. Boarman, and J. B. Metcalfe, for appellants.

Feighan, Wells & Herman, for respondent.

The opinion of the court was delivered by

STILES, J.—This action was commenced in the superior court of Spokane county in November, 1891, and was tried and a decree of foreclosure entered in June, 1892, upon the sole issue as to whether the alleged alteration in the notes should invalidate them. The case was appealed, and heard by this court January 10, 1893, upon the same issue, and a decision was filed March 9, following, affirming the decree. 6 Wash. 84 (32 Pac. 1017). A petition for rehearing was filed April 8, containing matters pertinent to the decision only, and that petition was denied May 8. Subsequently, and in November, 1893, a petition was filed in the superior court to modify the decree which had been affirmed, and this court prohibited the exercise of jurisdiction therein. *State, ex rel. Wolferman, v. Superior Court*, 7 Wash. 234 (35 Pac. 930). In deciding the matter of the prohibition, we remarked, in substance, that when a judgment or decree had been affirmed by this court, all applications for a modification of such judgment or decree must be addressed to this court alone. Upon this hint, as counsel explain, a petition has now been filed, praying that upon the showing made the remittitur be recalled; that the decree be modified so as to exclude certain portions of the mortgaged premises, and that the cause be remanded to the superior court with instructions to permit the answer to be amended so that the partial defense hereinafter mentioned may be set up and the rights of the parties to the excepted lands may be determined.

The basis of this application is contained in the following facts: The deceased Schneider sold and conveyed to

the appellant Bell, by warranty deed, the lands in question, and on the same day took in payment a sum of money, and the notes and mortgage here in litigation. The deed covenanted that if the purchaser should plat the land the grantor would, at any time, upon the payment of fifty dollars, convey by way of release any lot to the purchaser thereof; but the mortgage contained no reference to the subject of releases. After the decease of Schneider, his administratrix executed a deed of release of certain lots in accordance with the covenant in the original deed, and two of these lots, having been conveyed by Bell and wife to a third person, were re-conveyed by that person to Mrs. Bell, and the family home was erected thereon at an expense of several thousand dollars. When this suit was commenced this deed of release was in the possession of the appellants and was, by them, placed in the keeping of their attorneys, with the summons and other papers in the case. The answer set up the covenant in Schneider's deed, alleged that \$2,000 had been paid, that no lots had been released, and that the respondent had been requested to release certain lots, but had refused. No particular lots were mentioned, and the existing release was not pleaded. The reply denied the new matter.

No evidence touching the subject of releases was adduced at the trial. The omission to plead the release is accounted for on the part of the appellants by a showing of reliance upon their attorneys to do whatever was necessary to protect their interests, the release having been put into the attorneys' possession; and on the part of the attorneys the lapse is excused by the fact that the release described certain lots in Bell Park Addition to Spokane, which they were not informed was in fact the mortgaged tract of sixty acres.

Whether this court could, at any stage of an appeal, furnish the remedy here invoked, it is not necessary to say;

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but we are satisfied by the reason of the matter, and by the overwhelming weight of authority, that at this late day we not only ought not, but that we cannot legally, grant the appellants' demand. Courts of original jurisdiction generally have the power, for some time after a judgment has been rendered, to set it aside or modify it as legal circumstances may require. The time within which this may be done depends either upon statute or upon the common practice of the courts. Where the latter is the only guide the end of the "term" has been the universal limit. Of course, if a judgment be void on its face, it may be ignored or attacked in any wise at any time; or, if it has been procured by fraud, it may be set aside on motion within the limited period, or an independent suit to that end may be maintained afterward. But after the time fixed by law, or the well established practice, a judgment which is neither void on its face nor affected by fraud in its procurement or want of jurisdiction, stands for absolute verity; and neither the court which rendered, nor the appellate court which has affirmed it, has jurisdiction to vacate, modify or otherwise affect it. This is the universal rule, and there are no exceptions to it.

Concerning the limitations placed upon this court the appellants urge that inasmuch as, under the constitution, the court is always open, it has no terms, and therefore no fixed time beyond which it cannot modify its decisions. But, in our view, there are four periods, at one of which the jurisdiction must be held to cease, viz.: When the time for filing a petition for re-hearing has expired without the filing of such petition; when a petition on file has been denied; when the remittitur has been sent down; or at the expiration of the statutory sessions of the court in which one of the three foregoing events has taken place. We shall not now decide at which of these times the jurisdiction ends, since the application before us comes long after the

extremest limit mentioned. The modification made in *Bell v. Waudby*, 7 Wash. 203 (34 Pac. 917), was based upon a finding that the judgment inadvertently entered against certain respondents was void for want of service upon or appearance by them, and inasmuch as it was an original judgment for costs entered here, it was entirely proper that the application for a correction should be made here. There is no limit of time to such an application. The general principles upon this subject will be found discussed in Black on Judgments, § 306; Freeman on Judgments, § 101; *Tyler v. Magwire*, 17 Wall. 283; *Sibbald v. United States*, 12 Pet. 491.

The application is denied, and the stay heretofore ordered against the writ of assistance is vacated.

DUNBAR, C. J., and HOYT and ANDERS, JJ., concur.

SCOTT, J., concurs in the result.

[No. 964. Decided January 26, 1894.]

FREDERICK MEYER AND FREDERICK NACHTSHEIM, *Respondents*, v. THE TACOMA LIGHT AND WATER COMPANY, *Appellant*.

WATERCOURSES—DIVERSION—UNDERGROUND STREAM.

A riparian owner is not entitled to damages for the diversion of the waters of a stream tributary to a lake at whose outlet he was operating a mill, when the evidence shows that in the wet season there was abundance of water in the lake and stream, but in the summer season the stream ceased to flow into the lake over the surface of the ground, and there is nothing in the proofs tending to show that the water percolating below the surface was confined to a space immediately below or near the actual bed of the stream, although the proofs may show that the whole valley or watershed of the stream had an underlying impervious stratum; that such

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stratum was covered by a deposit of gravel of varying depth, and that the trend of this impervious stratum from each side of the stream was, in general, toward the bed thereof.

Appeal from Superior Court, Pierce County.

Stevens, Seymour & Sharpstein, for appellant:

Percolating water is a process of nature not apparent, and has, therefore, not received the protection which running water in a natural channel has always received. *Chase v. Silverstone*, 62 Me. 175; *Roath v. Driscoll*, 20 Conn. 532; *Ocean Grove Camp Meeting Ass'n v. Com'rs of Asbury Park*, 40 N. J. Eq. 447; *Taylor v. Fickas*, 64 Ind. 167; *Gould on Waters*, §§ 280, 282, 283; *Goodale v. Tuttle*, 29 N. Y. 459; *Pixley v. Clark*, 35 N. Y. 520; *Delhi v. Youmans*, 45 N. Y. 362; *Halderman v. Bruckhart*, 45 Pa. St. 514; *Taylor v. Welch*, 6 Or. 198; *Bassett v. Salisbury Co.*, 43 N. H. 569; *Mosier v. Caldwell*, 7 Nev. 363; *Bloodgood v. Ayers*, 108 N. Y. 400; *Phelps v. Noulén*, 72 N. Y. 46; *Angell on Watercourses*, § 114; *West v. Taylor*, 16 Or. 165; *Eulrich v. Richter*, 37 Wis. 226; *Chatfield v. Wilson*, 28 Vt. 54; *Lybes' Appeal*, 106 Pa. St. 626.

J. P. Cass, and *W. W. Likens*, for respondents:

Even if the current of the creek is under ground at certain seasons of the year, yet the same rules apply to such current as if it flowed on the surface. *Gould on Waters*, § 281; *Hale v. McLea*, 53 Cal. 578; *Smith v. Adams*, 6 Paige Ch. 435; *Mahan v. Brown*, 13 Wend. 261; *Sweett v. Cutts*, 50 N. H. 439; *Cole Silver Mining Co. v. Virginia Water Co.*, 1 Sawy. 470; *Strait v. Brown*, 16 Nev. 317.

The opinion of the court was delivered by

HORT, J.—The questions presented by this record have been elaborately briefed and ably argued by counsel for the respective parties. Such argument has extended over

a broad field, and raised questions the decision of which will have an important bearing upon the history of the state. The conclusion to which we have come as to the facts in the case will, however, make it unnecessary for us to say anything as to many of the questions suggested by the briefs.

The plaintiffs' action was founded upon the alleged fact that the diversion of water by the defendant from Clover creek and its tributaries had resulted in the lowering of Steilacoom lake so that the mill of the plaintiffs situated upon an outlet of said lake was, during the dry season, deprived of water necessary to its proper operation. Upon this question plaintiffs' own proof showed that there was no water flowing into said lake from said Clover creek upon the surface during the dry season. The undisputed proof further showed that during the wet season, when the waters of Clover creek did flow upon the surface into said lake, there was water more than sufficient to supply plaintiffs' needs. It appeared that during that part of the year there was more water flowing through the outlet upon which plaintiffs' mill was located than could well be controlled. It further appeared from the proofs that the waters flowing into the lake in the wet season did not so accumulate as to materially increase the flow in said outlet during the dry season of the year. To state it differently, it appeared from plaintiffs' own proof that at the time of year when it would be of any benefit to them there was no flow of the waters of Clover creek into said lake upon the surface of the ground, and that for that reason they were in no way damaged by the diversion of the water by defendant, unless they were entitled to have its flow into said lake under the surface of the ground protected the same as a flow upon the surface.

Such being the state of the proofs, it follows that, unless under the circumstances connected with such underground

flow plaintiffs were entitled to such protection, they have shown that they have no cause of action against the defendant. Plaintiffs, in their brief, have seen the importance of this question, and have entered into an elaborate argument in relation thereto in which numerous authorities tending to establish the fact that such flow should be protected have been cited. The authorities so cited by the plaintiffs, as well as those cited by the defendant, establish the doctrine that a flow underground will be protected the same as one upon the surface, if it constitutes a stream with defined course and boundaries.

That which has given rise to difficulty and much diversity among the authorities is as to the application of the rule. Some of the courts have held that the flow can only be protected when in a solid body like a stream on the surface, while others have applied the rule with greater liberality, and have afforded protection to the lower riparian proprietor when the underground stream was not so well defined. But so far as we have been able to discover, none of the cases have gone so far as to hold that he would be thus protected as to water which was percolating through sand or gravel within limits not at all defined by anything appearing upon the surface or made to appear by investigation beneath the surface. Counsel for plaintiffs insist that the proofs were sufficient to authorize a finding that the water in question was so flowing as to be entitled to protection.

The proof in regard thereto established this state of facts: That the whole valley or watershed of the stream had an underlying impervious stratum; that such stratum was covered by a deposit of gravel of varying depth; that the trend of this impervious stratum from each side of the stream was in general towards the bed thereof. Upon these facts plaintiffs contend that this whole watershed should be considered as the bed of the stream, and that

since the water which, higher up the stream, was flowing upon the surface could not get below this impervious stratum, it must, when under the surface, continue to form a stream within defined limits. There is nothing in the proofs in any manner tending to show that the water was confined to a space immediately below or near the actual bed of the stream upon the surface of the ground, hence the contention of plaintiffs can only be sustained by holding that the entire valley through which it flowed constituted the bed of the stream. No case has been cited that would justify such a ruling.

It has never been held that a flow of water percolating through the sand and gravel of the hillsides which lead down to the bed of the stream will be protected on account of the fact that such waters are confined to the valley to which such hillsides descend, and of which they form a part, by some underlying stratum below which the waters cannot go. If it had been shown by the proofs that the water all remained upon the surface until it arrived at a defined point, and then all disappeared, the conclusion might follow that it still retained its position as a stream confined to a point substantially identical with the bed upon the surface. But no such fact was in any manner made to appear. There was nothing to warrant any other conclusion than that the water spread itself through the gravel under and on each side of the stream, with no other boundaries than the underlying stratum of which we have spoken. There is nothing to at all indicate where or how within such boundaries the flow is continued. It may have appeared by inference that the waters, or a portion of them, eventually reached the lake, but there was nothing to show that they so reached the lake in any other manner than by percolation through the entire gravel bed of the valley of the stream.

These are the conclusions to which we have been forced

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Syllabus.

by the proofs, and applying thereto the doctrine of the cases referred to, it must be held that plaintiffs are not entitled to be protected in having such waters flow in an undiminished amount into the lake. And as these facts appeared at the time plaintiffs rested their case, defendant's motion for a non-suit should have been granted. The judgment must be reversed, and the cause remanded with instructions to dismiss the action.

DUNBAR, C. J., and SCOTT, STILES and ANDERS, JJ.,
CONCUR.

[No. 1023. Decided January 26, 1894.]

HERMAN ATROPS, *Respondent*, v. PETER COSTELLO AND
THE CITY OF SPOKANE, *Appellants*.

DEATH BY WRONGFUL ACT—DAMAGES—PROOF OF PECUNIARY
LOSS—EVIDENCE.

Punitive or exemplary damages cannot be recovered in an action brought under § 139, Code Proc., authorizing an action for the injury or death of a child.

In an action for damages for negligently causing the death of a child, pleading and proof of special pecuniary damages is unnecessary, as, in such cases, it falls within the province of the jury to judge of the pecuniary loss to the parents from the evidence showing the age of the child, its health, habits, character, and the station in life of the parents.

Where, in such an action, the plaintiff has testified to the age of his girl, who was a healthy and sound child; that she was industrious and capable and willing to work; was handy about doing housework; that the parents were engaged in keeping a boarding house, and that she was of great assistance to them in such employment; that the girl was going to school and he had intended to send her through the public schools; it is error to exclude testimony on the part of the defendant tending to show the expense attached to schooling, clothing and maintaining a child of her years, and the value of the earnings of a child of the same character in the same situation.

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19	135

Appeal from Superior Court, Spokane County.

Turner, Graves & McKinstry, and *F. T. Post*, for appellants:

Upon the right of defendant to prove the value of the services of the deceased child, and the cost of clothing, maintaining and educating her, as plaintiff testified he did and expected to continue to do, the appellant cited *Rajnowski v. Railroad Co.*, 41 N. W. 848; *Klanowski v. Railroad Co.*, 24 N. W. 807; *Pennsylvania Coal Co. v. Nee*, 13 Atl. 841; *Hurst v. Railroad Co.*, 48 N. W. 44.

W. W. D. Turner, and *Forster & Wakefield*, for respondent:

In this kind of an action it is not necessary to specify with any particularity the damages sustained by plaintiff because of the wrongful killing of his little girl. *Ihl v. Forty-second St. R. R. Co.*, 47 N. Y. 317; *Oldfield v. New York, etc., R. R. Co.*, 14 N. Y. 310; *McGovern v. New York, etc., R. R. Co.*, 67 N. Y. 417; *Little Rock, etc., R. R. Co. v. Barker*, 39 Ark. 491; *Parsons v. Missouri Pac. Ry. Co.*, 6 S. W. 464; *Potter v. Chicago, etc., Ry. Co.*, 21 Wis. 377; *Louisville, etc., Ry. Co. v. Buck*, 19 N. E. 453; *Ross v. Texas, etc., Ry. Co.*, 44 Fed. 44; *Nagle v. Missouri Pac. Ry. Co.*, 75 Mo. 653; *Gorham v. New York Central R. R. Co.*, 23 Hun, 449; *Westcott v. Central Vermont R. R. Co.*, 17 Atl. 745; *Chicago, etc., R. R. Co. v. Carey*, 3 N. E. 519; *Union Pacific Ry. Co. v. Dunden*, 14 Pac. 501; *Brunswick v. White*, 8 S. W. 85; *Illinois Central R. R. Co. v. Barron*, 5 Wall. 90; *O' Mara v. Hudson River R. R. Co.*, 38 N. Y. 445.

The opinion of the court was delivered by

DUNBAR, C. J.—This action was brought under § 139 of the Code of Procedure, wherein a father or, in case of the death or desertion of his family, the mother is author-

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ized to maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward. The action was brought by the father of Maggie Atrops, who was killed by a blast alleged to have been negligently and carelessly let off by the appellants.

It is contended by the respondent that the plaintiff in this action can recover punitive or exemplary damages, and it is desired, by the respective counsel in this case, that the court pass upon that question. The contention of the respondent is that § 139 is to be construed with reference to § 138. Sec. 139 corresponds with § 9 of the laws of 1873, and § 138 corresponds in part with § 8 of the laws of 1873, which provides that:

“The widow, or widow and her children, or child or children if no widow, of a man killed in a duel, shall have a right of action against the person killing him, and against the seconds, and all aiders and abettors, and shall recover such a sum as to the jury shall seem reasonable.”

The contention here is that § 9 standing alone does not prescribe any rule or measure of damage, nor does it provide under what circumstances suit may be maintained for the injury or death of the child, nor against whom said action may be maintained, and that without it is construed with, and as a part of, the chapter with which it is enacted, it is absolutely meaningless, and that therefore the measure of damages provided for in § 8 of said chapter—that is, “such a sum as to the jury shall seem reasonable”—was intended by the legislature to apply also to § 9. After the enactment of these sections in 1873, the following amendments were made in 1875, to wit: Sec. 4 of the Laws of 1875 (p. 4) provides as follows:

“The following additional section shall follow § 8 [referring to § 8 of the Laws of 1873] as a new section in the chapter of said act to which this is amendatory, relating to parties to actions, that is to say:

“SEC. —. When the death of a person is caused by the

wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or when the death of a person is caused by an injury received in falling through an opening or defective place in any sidewalk, street, alley, square or wharf, his heirs or personal representatives may maintain an action for damages against the person whose duty it was, at the time of the injury, to have kept in repair such sidewalk or other place. In every such action the jury may give such damages, pecuniary or exemplary, as, under all the circumstances of the case, may to them seem just."

This section, with the amendment passed in 1875, appeared in the Code of 1881 as § 8, leaving out the words, "shall recover such a sum as to the jury shall seem reasonable," which words were not repealed by the enactment of 1875, without it may be considered that they were repealed by implication by the enactment of the provision in the same section that, "in every such action the jury may give such damages, pecuniary or exemplary, as, under all the circumstances of the case, may to them seem just;" this provision being somewhat inconsistent with the former provision at the end of § 8 of the Laws of 1873, that a person should "recover such a sum as to the jury shall seem reasonable." But, however that may be, construing the sections with reference to the statute of 1873 before it was amended, it seems to us that the provisions of § 8 were not intended to apply to § 9, which provides for altogether a different character of action. § 8 providing for a specific action where a man was killed in a duel, and § 9 providing for the maintenance of an action for injury or death of a child generally. Therefore, we think that under the decision of this court in *Hoefer v. Spokane Truck & Dray Co.*, 2 Wash. 45 (25 Pac. 1072), the doctrine of punitive or exemplary damages will not apply to an action brought under § 9 of the laws of 1873, being § 139 of the Code of Procedure.

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Upon the trial of this cause, evidence was offered by respondent tending to show that the death of the child was caused by the carelessness of the defendant, and all the circumstances attending her death. Plaintiff testified to the age of the girl, who was a healthy and sound child; that she was industrious and capable and willing to work; was handy about doing housework; that the parents were engaged in keeping a boarding house, and that she was of great assistance to them in such employment. Defendant objected to any evidence whatever as to the damage, or which tended to show damage, by loss of services or otherwise, which plaintiff had sustained, for the reason that under the complaint there could be no recovery excepting for nominal damages; and to the introduction of any evidence under the complaint, for the reason that it did not state a cause of action, and that there was an improper joinder of defendants. Both of these objections were overruled by the court, and defendants excepted.

At the conclusion of plaintiff's evidence, defendants moved for a non-suit, on the ground that the complaint did not state a cause of action; that the evidence did not show any liability against the defendants, and that there was no statute in this state providing a liability in a case of this kind upon an action by the father; which motion was by the court overruled. Defendants then moved the court to instruct the jury to bring in a verdict against defendants for nominal damages, upon the ground that plaintiff failed by his evidence to show any damages; which motion was denied. Defendants then proceeded to the introduction of testimony showing the cost of clothing a girl between the ages of eight and eighteen years in Spokane, in the poorer walks of life; how much time she would be occupied in school; how much leisure she would have in going through the public schools of the city; what would be the cost of providing for such a child in a comfort-

able and decent way; how much she could earn; how much, if any, service she could be to her parents, and others; and as to whether she could render any service between those years and while she was in attendance upon the public schools; all of which was objected to by plaintiff, and objection sustained on the ground that such testimony was immaterial, irrelevant and incompetent.

We are of the opinion that the motion for non-suit was properly overruled; and without entering into any review of the authorities, which has so often been done in cases of this character, we are satisfied that the great weight of authority sustains the doctrine that judgment can be obtained in the absence of proof of special pecuniary damage. It is true that a great many of the cases which sustain this position are in states where exemplary damages are allowed in cases of this kind; but the general doctrine is stated on the broad ground that proof of special damages is impracticable, and that no specific loss occasioned by the death of a child is necessary, for the reason that calculations of this kind are within the special province of the jury, and that the jury is as well calculated, knowing the age of the child, her health, her habits, her character, and the station in life of her parents, to judge of the pecuniary loss to the parents, as witnesses who might be called to testify.

But, while this may be true, and a plaintiff would have a right to rest after furnishing the jury with sufficient data from which they could come to an intelligent conclusion as to the amount of damages sustained by a parent, we do not think the rule should be extended so as to preclude the defendant, if he saw fit, from introducing testimony affirmatively showing that no damages could arise from the state of facts testified to by the plaintiff; as, for instance, in this case, the plaintiff testified that he was sending the girl to school; that he intended to send her through the public schools of Spokane; that he expected to give her the full

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advantage of the schools; and testified how he clothed and lodged her, and to her capability for work. We think it was certainly competent for the defendant to show by competent testimony the expense of such schooling, such clothing and lodging and maintenance generally, and the value of the earnings of a child of the same character and in the same place, and any other pertinent facts which might assist the jury in reaching a conclusion as to the proper amount of damages which would be sustained by the parents by reason of the loss of their child. It is true that difficulties present themselves from every standpoint, and that no rule can be laid down to which objections cannot be raised, but we think it is going too far to deprive the defense of introducing any testimony with relation to the damages which he is called upon to pay in cases of this kind, which would be the result of excluding the testimony offered by the defendant in this case, and his defense would be confined entirely to the question of negligence.

In view of a new trial it will not be necessary to pass upon the question of the excessiveness of the verdict.

For the error alleged in excluding defendants' testimony, above referred to, the judgment will be reversed, and a new trial granted.

HOYT, ANDERS and STILES, JJ., concur.

SCOTT, J., dissents.

[No. 1051. Decided January 26, 1894.]

JOHN RUSSELL, *Appellant*, v. THE CITY OF TACOMA, *Respondent*.

MUNICIPAL CORPORATIONS—LIABILITY FOR INJURIES RECEIVED IN PUBLIC PARKS.

Where a city is given a license to occupy lands for park purposes for the use of the public, it is not liable for injuries occasioned by the negligence of its officers and employes while engaged in the improvement of the park for the benefit of the public.

Appeal from Superior Court, Pierce County.

Heilig & Hartman, and *Wiley & Bostwick*, for appellant.

F. H. Murray, and *Doolittle & Fogg*, for respondent.

The opinion of the court was delivered by

ANDERS, J.—The City of Tacoma is a city of the first class. Its charter was framed and adopted in accordance with the provisions of the act of the legislature, entitled “An act to provide for the government of cities having a population of twenty thousand or more inhabitants, and declaring an emergency,” approved March 24, 1890 (Laws 1889–90, p. 215). Cities organized under this act are empowered to “lay out, establish, open, alter, widen, extend, grade, pave, plank, establish grades, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and other public grounds, and to regulate and control the use thereof,” and these provisions of the statute are incorporated into and are a part of the city charter.

By an act of congress, approved December 17, 1888, there was granted to the city of Tacoma a license to occupy and control for the purposes of a public park for the use and benefit of the citizens of the United States, and for no

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40	61
8	156
42	137

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other purposes whatever, a certain described tract of land known as Point Defiance Park. This license is subject to the condition expressed in the act, that the United States may take possession of and occupy said land, or any part thereof, for military or other purposes whenever the proper officers of the United States may see fit to do so.

The charter of the city of Tacoma provides for a board of park commissioners, consisting of five members, to be appointed by the mayor and confirmed by the city council; and it is made the duty of the board, subject to such rules and regulations as the city council may by ordinance provide, among other things, to take charge of and exercise control over all parks belonging to the city, to make report to the city council from time to time regarding the condition of the parks, and to recommend appropriations by the council for the improvement of the parks, and when such appropriations have been made, expend the same in such improvements; but no member of said commission shall have power to create any debt, obligation, claim or liability except with the express authority of said commission, conferred at a meeting thereof duly convened and held; to make such rules and regulations in regard to the use of the parks as shall best subserve the interests of the public; and generally, to do all things necessary and proper to secure for the public the free use and enjoyment of said parks.

While the board of park commissioners were in possession of Point Defiance Park, and were improving the same for park purposes, appellant was injured by an explosion of giant powder and dynamite which occurred in a building erected thereon by the commissioners. It appears that at the time of the explosion the appellant was a laborer under the control of a foreman employed by some one connected with the board of park commissioners, and that the powder and dynamite which exploded were stored in a

building used for the purposes of a blacksmith shop and for storing tools. The blacksmith was engaged in sharpening tools, and the explosives were ignited by sparks from his forge or anvil. This action was brought to recover damages for injuries to the person and property of the appellant, alleged to have been caused by the carelessness and negligence of the city in thus storing dangerous explosives in the place above mentioned. The court below held that the city was not liable, and dismissed the action, and plaintiff appeals.

The only question necessary to be determined is, whether the city is liable for malfeasance or misfeasance of its officers while employed in the prosecution of a public work of the character of the one under consideration. It is contended by the learned counsel for the appellant that the board of park commissioners while engaged in this work were but agents of the city, and that the work itself was but a private enterprise undertaken by the city for its own benefit, and if this be true there is no doubt that the city is liable to the same extent that a private corporation or individual would be liable under the same circumstances.

As supporting the appellant's contention, that the improvement of Point Defiance Park was an improvement of mere local concern, affecting merely the interests of the municipality, we are cited to the case of *State, ex rel. Wood, v. Schweickardt*, 109 Mo. 496 (19 S. W. 47). It appears from an examination of this case that the city of St. Louis was the owner of Forest Park, and, under the power given it by law, was attempting to lease a portion of it for the sale of intoxicating liquors and other refreshments at the park. Proceedings were instituted by the attorney general, in the name of the state, to prevent the city from so doing, and the court held that—

“In relation to the property in question, and the discretionary control of the city over it, it must be regarded

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as a matter of purely local concern, as held and owned by the city not in its political or governmental capacity, but in a *quasi* private capacity, in which the municipal authorities act for the exclusive benefit of the corporation whose interests they represent.”

We have no doubt of the correctness of that decision, and, if the facts were the same in the case at bar, that case would be cheerfully recognized as high authority in favor of the appellant's contention. But in one respect at least the facts of this case are essentially different. There the city was the owner of the park and was leasing it for its own private emolument. In this case the city of Tacoma is not the owner of Point Defiance Park, and has no interest in it whatever excepting a license to occupy and control it for the purposes of a public park. It is frankly conceded on behalf of the appellant that if the acts complained of were not proprietary merely, but public and governmental, the city is not liable in this action. While it is not always easy to draw the line between the public, or governmental, and private powers of municipal corporations, we think the respondent city, under the facts in this case, in improving the park, was exercising a power or franchise conferred upon it for the public good and not for private corporate advantage. And this being so, it is not liable for the acts or omissions of its officers in that behalf. *Murtaugh v. City of St. Louis*, 44 Mo. 479; *Hart v. Bridgeport*, 13 Blatchf. 289; *Richmond v. Long's Adm'rs*, 17 Grat. 375; *Mead v. New Haven*, 40 Conn. 72; *Ham v. Mayor, etc.*, 70 N. Y. 459; *Tindley v. Salem*, 137 Mass. 171; *Howard v. Worcester*, 153 Mass. 426 (12 L. R. A.; 27 N. E. 11); *Curran v. Boston*, 151 Mass. 505 (24 N. E. 781); *Sherbourne v. Yuba County*, 21 Cal. 113.

In *Murtaugh v. St. Louis*, *supra*, it was sought to make the city of St. Louis respond in damages for injury to a non-paying patient caused by the negligence of hospital officers and servants, and in speaking of the non-liability of

municipal corporations for the acts of their officers and agents, the court declared the general result of the authorities as follows:

“Where the officer or servant of a municipal corporation is in the exercise of a power conferred upon the corporation for its private benefit, and injury ensues from the negligence or misfeasance of such officer or servant, the corporation is liable, as in the case of private corporations or parties; but when the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, then the corporation is not liable for the consequences of such acts or omissions on the part of its officers and servants.”

The same doctrine was enunciated in other cases above cited; and in *Mead v. New Haven* it was accordingly held that the city was not liable for the negligence of an inspector of steam boilers, and in *Ham v. Mayor*, that the city was not liable for the negligence of servants employed by the department of public instruction. In *Tindley v. Salem* it was held, upon an elaborate review of the authorities, that the defendant city was not liable for the negligence of its servants in discharging fireworks which were purchased and used for the purposes of a public celebration. In *Howard v. Worcester* the plaintiff was injured by the negligent blasting of rock in excavating the foundation for a public school house, and the court held that as the work was purely a benefit to the public, no liability was thereby created against the city. See also *Condict v. Jersey City*, 46 N. J. Law, 157; *Bryant v. St. Paul*, 33 Minn. 289 (23 N. W. 220); and *Barney v. Lowell*, 98 Mass. 570.

Upon the liability of towns for defects in their public commons, the supreme court of Massachusetts, in *Clark v. Waltham*, 128 Mass. 567, said:

“The plaintiff was injured while traveling upon a public park having footpaths across it, which, it is alleged, the defendant had negligently suffered to be out of repair and

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unsafe. The park was conveyed to the town upon the condition that it should 'forever after be kept open as and for a common for the use of said inhabitants of the town of Waltham.' By accepting the deeds of conveyance, the town agreed to the condition, and therefore holds the park for the use of the public. It had constructed footpaths and walks over the park in various directions, but these paths were not a part of the system of highways. They were not laid out as public ways, and the town is not liable under the statutes respecting highways or townways for any defect or want of repair which may exist in them. *Oliver v. Worcester*, 102 Mass. 489; *Gould v. Boston*, 120 Mass. 300. Nor can the town be held liable upon the ground that it negligently suffered a dangerous place to exist in the park, and failed to give proper notice to persons using the park by its invitation or license. It holds the park, not for its own profit or emolument, but for the direct and immediate use of the public.

"If it can be said that there is any duty in the town to construct paths over it, or to keep such paths in repair, it is a corporate duty, imposed upon it as the representative and agent of the public and for the public benefit. For a breach of such a duty, a private action cannot be maintained against a town or city, unless such action is given by statute."

Other reasons are urged by counsel for respondent for sustaining the judgment of the lower court, but as what we have said disposes of the case, it is not necessary to discuss the points made.

The judgment is affirmed.

DUNBAR, C. J., and HOYT, STILES and SCOTT, JJ.,
concur.

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86	228

[No. 1183. Decided January 27, 1894.]

THERESA KLEPSCH, *Administratrix, Respondent*, v.
GEORGE DONALD *et al.*, *Appellants*.

NEGLIGENCE — DISCHARGE OF BLAST — WITNESS — IMPEACHMENT —
INSTRUCTIONS — APPEAL — HARMLESS ERROR — WEIGHT OF TESTI-
MONY.

Where a heavy fragment of rock is, by the discharge of a blast, thrown a distance of 940 feet, through the roof of a house, killing a man within, such fact is *prima facie* proof of negligence in the management of the blast; and such presumption of negligence is not rebutted by proof that the employés managing the blasting were competent and careful men, and had received strict instructions to be careful.

The admission of incompetent testimony in rebuttal of immaterial evidence is harmless error.

A witness who has testified at a former trial on the same subject matter may be impeached by allowing the stenographer, who had taken notes at the time of the former trial, to read his notes, after showing that they were correct and that aside from them he had no recollection of what the witness had said.

Where there has been no comment in argument to the jury upon the presence of witnesses brought from long distances, it is not error for the court to refuse to charge that no unfavorable inference is to be drawn by the jury against the credibility of such witnesses, because of the defendants having paid or agreed to pay their necessary expenses in attending the trial.

Where there is a substantial conflict of testimony the verdict of the jury will not be set aside.

Appeal from Superior Court, Spokane County.

Thomas C. Griffiths, and Kinnaird & Happy, for appellants:

Under circumstances of this case no presumption of negligence arose from the bare fact of injury. Some specific act of negligence, either of omission or commission, must be shown in evidence against defendant before plaintiff can recover. *Hawkins v. Front St. Cable Ry. Co.*, 3 Wash. 592;

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North Side St. Ry. Co. v. Want, 15 S. W. 40; *Daniel v. Metropolitan Ry. Co.*, L. R., 5 H. L. 45; *Frech v. Philadelphia, etc., R. R. Co.*, 39 Md. 574; *Philadelphia, etc., R. R. Co. v. Stebbing*, 19 Am. & Eng. R. R. Cases, 38; *Attrester v. Hudson River R. R. Co.*, 2 E. D. Smith, 151; *Shear. & Redf., Neg.* (4th ed.), §§ 57-59, and authorities cited in notes.

John B. Hess, and *Turner, Graves & McKinstry*, for respondent:

The *fact of injury* is not evidence of negligence; but the *fact of a blast large enough* to throw a rock 900 to 1,200 feet, in a settled portion of the city, is sufficient evidence to that point. It is just to such a case as this that the maxim, *res ipsa loquitur*, applies. This means not that the fact of injury may ever be evidence of negligence, but that the circumstances under which occurs the accident causing the injury, and which attend and surround it at the time, show of themselves negligence. *Tuttle v. Chicago, etc., R. R. Co.*, 48 Iowa, 236; *Lowery v. Manhattan Ry. Co.*, 99 N. Y. 158; *Mullen v. St. John*, 57 N. Y. 567; *Thomas v. Western Union Telegraph Co.*, 100 Mass. 156; *Eagle Packet Co. v. Defries*, 94 Ill. 598; *Stokes v. Saltonstall*, 13 Pet. 181; *Railroad Co. v. Pollard*, 22 Wall. 342; *Byrne v. Boadle*, 2 Hurl. & C. 722; *Kearney v. London, etc., Ry. Co.*, L. R., 5 Q. B. 411; *Shear. & Redf., Neg.* (4th ed.), §§ 59, 60.

The opinion of the court was delivered by

STILES, J.—This is a second appeal in this case, the decision on the former appeal being found in 4 Wash. 436 (30 Pac. 991). The facts proven did not differ materially from those presented at the first trial, excepting that upon the matter of ascertaining the damage suffered, the showing was in accordance with the rule laid down by this court,

the defendants were allowed to show the methods they employed in conducting their blasting operations, and they offered proof tending to show that the deceased Klepsch was a trespasser upon lands put into their possession by the railroad company in connection with their grading contract.

The first error complained of is the refusal of the court to sustain a motion for a non-suit, on the ground that the plaintiff had failed to show the specific act of negligence on the part of the defendants which caused the injury. Counsel renews, under this head, the proposition urged at the former hearing, that the mere fact of an injury caused by the hurling of the rock was not *prima facie* proof of negligence in the management of the blast, and many cases are cited to sustain the position that the fact of injury does not generally prove negligence.

Hawkins v. Front St. Cable Ry. Co., 3 Wash. 592 (28 Pac. 1021), is one of the cases cited, and there was not at the former hearing of this case, nor is there now, any disposition on the part of this court to depart from the rule there adhered to; nor do we concede that any such departure was made. The fact of the injury, and the circumstances under which it occurred, viz., by the casting of a rock such an unreasonable distance as 940 feet, with an explosive which, by its very nature, destroys all the evidence of the way in which it is managed, except as it may be proven by parties interested in avoiding liability, was the basis of the ruling which we said ought to be the law of such cases. A passenger on a railroad train is injured, and the fact of injury alone does not sustain a charge of negligence; but if the train was derailed by reason of a broken wheel, the presumption arises that the carrier was negligent in not providing a sound one. So here, the deceased was injured in his own house, and at a distance from the place of the blast which the evidence shows was the

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Opinion of the Court — STILES, J.

very extreme of distances to which rocks could be thrown in that manner, being more than three times the distance to which they were usually thrown, and it lay with the defendants to explain how this unreasonable circumstance happened, and that it was not their fault. Nor was it any answer to show that they had given their employes strict general instructions to be careful, or that the employes were competent and usually careful men. The very fact shown in the case that, in general, the rocks from defendant's blasts did not fly half as far as these particular rocks, certainly tended to show that there must have been an unusually heavy charge behind these rocks, or that some less than usually efficient means was taken to prevent their flight to such a prodigious distance.

Upon the point of the ordinary distances to which rocks thrown from a carefully managed blast would go, the evidence of the plaintiff was meager, but the defendants' evidence fully supplied any deficiency in that respect and therefore cured whatever error there may have been in refusing the non-suit. The claim is also made that this presumption was rebutted by the evidence showing the precautions that were generally taken, but that did not suffice; none of the evidence was directed to the point of showing how this particular blast was treated. In this connection we may also dispose of the exceptions on account of the court's refusal to allow certain questions to be answered touching the directions given employes and their usual method of laying and protecting blasts. The ingenuity and persistence of counsel were sufficient to circumvent this obstacle, and the same questions were fully answered elsewhere.

Defendants, in order to show that the deceased was, as to them, a mere trespasser on the land where his house was, produced their grading contract with the railroad company and claimed that, as the land about the place where they

were grading was an odd section which belonged to the railroad company, they had the implied right to the possession of the whole tract for the prosecution of their work. In response to this claim a great deal of testimony was taken going to show that the railroad company had given to certain third parties an oral option to buy the land where the Klepsch house was, with permission to take possession and remove squatters, of whom Klepsch was one, or require them to admit a tenancy by the payment of rent. There was testimony tending to show that Klepsch had paid, or agreed to pay, rent, and also that the place where he was injured was a dedicated but unopened street. Exceptions were taken to the admission of the testimony concerning the option, etc., and they are here urged on the ground that any such contract must have been in writing. But however that may be, we are of opinion that this testimony did the defendants no harm because their own proposition as to their right of possession was not sustained. All that could be implied from their contract was that they should have possession of such portions of the railroad company's lands as were necessary and convenient for the prosecution of the grading work covered by the contract, and it nowhere appeared that the location of the Klepsch house was thus either necessary or convenient. We will guard this last remark by expressing a serious doubt whether a mere trespasser upon premises devoted to blasting, as claimed, could be injured, under the circumstances of this case, without liability on the part of those who injured him.

To impeach a witness who has testified at the former trial, the respondent produced the stenographer who had taken notes of the testimony, and had him read his notes, after showing that he had taken them at the time, that they were correct, and that aside from them he had no recollection what the witness had said. We think the practice was correct. *State v. Freidrich*, 4 Wash. 204 (29 Pac. 1055).

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Certain of the witnesses for the defense were brought from long distances, one of them from without the state, and the court was asked to charge the jury to the effect that no unfavorable inference was to be drawn by the jury against the credibility of such witnesses, because of the defendants having paid or agreed to pay their necessary expenses in attending the trial; refused. The substance of this request would be entirely proper in a proper case; but the propriety of it would depend on whether the jury was invited, in argument, to draw any such inferences. The record before us does not show that counsel for the plaintiff in any way commented upon the presence of the witnesses at the trial, and there was, therefore, no error.

The main point of the contest in this case centered upon the question whether the rock which killed Klepsch was thrown from the defendants' works, or whether it came from the Franklin school grounds, which were much nearer and where blasting was in progress during the same period; but upon this point we cannot interfere, for there was a substantial conflict of testimony which it was properly left to the jury to decide.

There were sundry exceptions not here specifically noticed, but the alleged errors upon which they were founded either do not appear in the record, or were connected with the instructions, and the latter were either covered fairly by the charge of the court, or have been incidentally disposed of in the foregoing opinion.

Finding no reversible error, the judgment will be affirmed.

DUNBAR, C. J., and SCOTT and ANDERS, JJ., concur.

HOYT, J., dissents.

[No. 1058. Decided January 29, 1894.]

THE STATE OF WASHINGTON, *on the relation of Samuel E. DeRackin, Appellant*, v. L. V. ALLEN *et al.*, *Commissioners, Respondents*.

COUNTY COMMISSIONERS—AWARD OF COUNTY PRINTING—
MANDAMUS.

The order of the board of county commissioners in accepting a bid for county printing, under the provisions of §2936, Gen. Stat., does not constitute a contract with the bidder nor conclude the board from rescinding its order and making another award. (DUNBAR, C. J., dissents.)

Mandamus will not lie to compel the county commissioners to make an award for county printing, as there is an adequate remedy by appeal from their orders in such cases.

Appeal from Superior Court, Lincoln County.

N. T. Caton, and David Higgins, for appellant.

C. H. Neal, J. W. Merritt, and R. K. McComb, for respondents.

The opinion of the court was delivered by

HOYT, J.—By this proceeding relator sought to compel the board of county commissioners of Lincoln county to enter into a contract with him for the county printing for the year ending June 30, 1894. The superior court sustained a demurrer to the alternative writ and petition, and dismissed the proceeding, and from its judgment thereon this appeal is prosecuted.

It appears from the petition contained in the record that the relator had put in a bid in due form for the county printing to be let by the board of county commissioners, as provided in § 2936 of the Gen. Stat.; that on the 4th day of May the board made and caused to be entered of record an order in substantially the following form:

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Opinion of the Court — HORT, J.

“In the matter of the county printing for the year beginning July 1, 1893:

“The board having examined the various bids for same hereby awards said printing to the Lincoln County *Democrat* as per bid on file with this board, that paper being the best and lowest bidder therefor: *Provided however*, That the proprietor of said paper enter into a contract as required by law for doing the same, and give a good and sufficient bond for the faithful performance of the work.”

That the relator was the proprietor of the paper named in said order. It further appears from the record that on the fifteenth day of May, 1893, the board entered another order, which in terms rescinded and repealed the one above set out, and awarded the county printing to another paper. Between the entry of the first order and of the second one relator had tendered to the board of county commissioners several different forms of contracts executed by himself, and asked that one of them be executed by the board of county commissioners. He also tendered a bond, and asked that it be approved. None of the contracts tendered by relator seemed to satisfy the board, and they refused to sign any of them; they also refused to approve the bond.

Two principal questions are presented for our decision: (1) Was the order of May 4th such a final conclusion of the letting of the county printing that the board had no jurisdiction to interfere with said order? and (2), had the relator a remedy by appeal to the superior court?

As to the first proposition, the form of the order entered by the board shows that it did not consider it a final determination of its duties in reference to the award of the printing. The language thereof would warrant the conclusion that the board in making it had only intended to pass upon the question of the relative merits of the bids as such, and had reserved the questions of the responsibility of the bidder and of the exact terms of the contract for

further consideration. If the order should be thus construed, it would follow that the board retained sufficient jurisdiction over the subject matter to rescind the order if, before the contract was entered into or the bond was approved, they came to the conclusion that the relator was not in fact the lowest and best bidder. This would give it jurisdiction to enter the order of May 15th. Not only would it have this jurisdiction by reason of the reservation in the order of May 4th, but, in our opinion, it would have had such jurisdiction, however absolute the form of said order, if the rescission was made before a contract was entered into or anything done to establish the rights of the parties further than the entry of said order.

A fair construction of the section under which the board of county commissioners are required to let the county printing contemplates that there should be a contract entered into, and until this has been done, the order of the board in accepting any particular bid does not constitute conclusive action on its part. If this section were not so construed the advertisement for bids would have to set out all the details necessary in a contract, and before action was taken upon the bids a bond would have to be furnished so that in the order accepting the bid there could also be included an order approving the bond. In our opinion the statute does not contemplate that the bidder shall put in any bond until after an award has been made, and then the successful bidder alone is required to put in a bond. If this be so, it must follow that the acceptance of the bid does not complete the transaction, for something further is required before the statutory provisions have been complied with, to wit, the furnishing and approval of the bond of the successful bidder; and if he does not comply with the order of the board in that regard there can be no doubt that it would have the right to rescind the acceptance of his bid, and proceed under the statute to make another award.

Jan. 1894.] Concurring Opinion — DUNBAR, C. J.

The order of May 15th having been made with jurisdiction, it must have force until reversed by the board itself, or by some revisory power. The proceeding by mandamus can give the court no jurisdiction to reverse or in any manner affect such order if it was entered by the board in reference to a subject matter as to which it still had jurisdiction.

What we have said furnishes sufficient reason for the decision of the lower court, but we are also satisfied that the mandamus was properly denied for the reason that there was an ample remedy by appeal. No satisfactory reason has been suggested upon the argument why the relator might not have availed himself of the provisions of the statute in that regard. That an appeal will lie from orders of this kind was ruled by this court in *Baum v. Sweeney*, 5 Wash. 712 (32 Pac. 778).

The judgment of the superior court must be affirmed.

SCOTT, J., concurs.

DUNBAR, C. J. (*concurring*).—I concur in the result, because I think there was a plain and adequate remedy by appeal, but I do not place the same construction on § 2936 of the General Statutes as do my brothers in the majority opinion. The consideration of the whole section clearly satisfies me that no special contract is therein contemplated and that none should have been demanded of the successful bidder. The specifications are published; the publishers, on the proposition therein contained, base their calculations and make their respective bids; and on those bids the county commissioners make the award, and they are authorized by the statute to take into consideration but one thing outside of the bid. That consideration is the circulation of the papers bidding. The question of responsibility is provided for by the bond. If the required bond is not forthcoming, that ends the consideration of that bidder.

In this case the board passed upon all of these questions. They found that appellant was the lowest and best bidder, and the award was made to him. An offer was made and accepted. This, it seems to me, made a complete contract and is the contract, and *all* the contract, contemplated by the statute; and when the appellant provided a good and sufficient bond he had a right to have it approved. It appears from the argument in this case that the board did not refuse to approve the bond because the bond itself was not ample and sufficient in every way, but because appellant would not enter into such a contract as suited the board concerning work which was not provided for in the bid. Every character of work must be presumed to have been called for and contemplated in the bid, or else the call for bids amounts absolutely to nothing. Under such a construction of the law the bidder can make no estimate upon which to base a bid, for it can be plainly seen that the acceptance of the bid will not depend upon the character of the proposition in answer to the call, but will depend upon some private contract which the bidder must make with the commissioners with reference to work not contemplated by the bid, and concerning which there can be no competition. In other words, the call for bids becomes a farce pure and simple, and the board can let the contract to whom it pleases, and on what terms it pleases, and the law is ineffectual for any purpose whatever. I prefer to give it a construction which leaves it with some efficacy, and which, it seems to me, is the natural construction to be placed upon the language used.

ANDERS, J. (*concurring*).—It is shown by the record in this case that the relator's bid for the county printing was merely an offer to do certain specific portions of such printing free of charge. As to other and equally important portions, the proposal was entirely silent. It, there-

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fore, seems to me that he failed to file with the clerk of the board of county commissioners such a bid as the statute contemplates, and that the one he did file was not such as the commissioners could favorably consider and act upon. As the statute requires the letting of the county printing as a whole, to but one person, or rather, to the publisher or publishers of one newspaper, the commissioners were not at liberty to accept a bid for a portion of the printing merely. And this being so, when they formally accepted the relator's proposal on the 4th day of May, they did that which they had no authority to do, and consequently were not bound by that order, and properly disregarded it thereafter.

I am of the opinion, however, that if the relator had filed a proper bid, and such bid had been accepted by the commissioners, the result would have been a binding contract between him and the board; but having failed to do so, he had nothing before the commissioners upon which it was their duty to act. And that fact fully justified them in rejecting the contract and bid tendered by the relator. Irrespective, therefore, of the reasons given in the opinion of Mr. Justice HORT, I think the judgment of the lower court should be affirmed.

STILES, J.—I concur with Justice ANDERS.

[No. 925. Decided January 31, 1894.]

FRED T. TAYLOR, *Appellant*, v. THE CITY OF TACOMA,
Respondent.

MUNICIPAL CORPORATIONS—FREEHOLDERS' CHARTER—DELEGA-
TION OF POWER—SALARIES OF OFFICERS.

Under the act of March 24, 1890, delegating to cities of twenty thousand or more inhabitants the power to frame a charter for their government, the salary of elective officers must be provided for in the charter itself, and cannot be re-delegated by the charter framers to the legislative bodies of such cities.

Sec. 216 of the freeholders' charter of Tacoma (1890) providing that "all the officers of the city . . . shall receive in full compensation for all services of every kind whatsoever rendered by them the amount of salaries that may be fixed by ordinance, . . . but in no case shall said salaries exceed the following amounts: . . . City controller, \$4,000 per annum," is an attempted delegation by the charter framers of the power of fixing salaries, and an ordinance passed in pursuance thereof is *ultra vires*, under the provisions of § 6, Laws 1889-90, p. 223.

Appeal from Superior Court, Pierce County.

S. C. Milligan, and *J. S. Whitehouse*, for appellant.

F. H. Murray, for respondent.

The opinion of the court was delivered by

ANDERS, J.—The appellant sued the city of Tacoma for a balance of salary alleged to be due him as city controller. At the time of his election, in November, 1890, no salary was attached to his office, but on December 4, 1890, the city council passed an ordinance fixing his salary at \$3,000 per annum, payable monthly, and providing that said ordinance should take effect from and after the 4th day of November, 1890. Subsequently, and on the 5th day of February, 1891, the city council passed another ordinance in which the salary of the city controller was

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fixed at \$2,400 per annum, payable monthly. The appellant received pay at the rate of \$3,000 per annum up to the 5th day of February, 1891, and from that time until the end of his term, on April 19, 1892, he received a salary at the rate of \$2,400 per annum. He now seeks to recover the difference between what he actually received and what he would have received at the rate of \$4,000 per annum, which he claims was the amount of his annual salary as prescribed in the charter; or, if he is not entitled to that sum, then he demands judgment for the difference between the amount received by him and the amount he would have received at the rate of \$3,000 per annum, the sum specified in said ordinance of December 4, 1890.

The cause was tried before the court without a jury, and upon the evidence adduced the court concluded — (1) That no salary was fixed in the charter; and (2) that the salary ordinances heretofore mentioned were ineffectual and void. The action was accordingly dismissed at the cost of the plaintiff. The appellant alleges that the court was in error upon both of the above propositions, and therefore asks a reversal of the judgment upon that ground.

At the time of the appellant's election, the city of Tacoma was operating under a charter prepared and adopted under and by virtue of an act of the legislature for the government of cities of twenty thousand or more inhabitants, approved March 24, 1890. To all cities organized under that act certain defined powers and privileges are granted which are required to be set forth in their charters. Among the powers thus granted is that of fixing the compensation of elective officers, including the city controller. Concerning that question the enabling act reads as follows:

“The legislative powers of any city organized under the provisions of this act shall be vested in a mayor and a city council, to consist of such number of members and to have

such powers as may be provided for in its charter, who, together with such other elective officers as may be provided for in such charter, shall be elected at the times, in such manner and for such terms, and shall perform such duties and receive such compensation, as may be prescribed in such charter." See Laws 1889-90, p. 223, § 6.

From the foregoing provisions of the statute it seems evident that it was the intention of the legislature to delegate the power under consideration to the framers of the city charter, and to no other persons or body whatever. That it was competent for the legislature to do so we have no doubt. It, therefore, follows that if the city charter fails to prescribe the amount of compensation to be paid the city controller, then no salary has ever been attached to his office, for the simple reason that the freeholders who framed the city charter had no power or authority to delegate any of the duties imposed upon them to the city council.

It is contended on behalf of the appellant that by the terms and provisions of the charter his compensation was fixed at \$4,000 per annum, and if that be true, the judgment of the court below was wrong, and must be reversed. On the other hand, it is claimed on behalf of the city that no compensation was attempted to be fixed or prescribed in the city charter, but that, at most, the framers of said charter simply undertook to delegate the power of fixing salaries to the city council. In order to determine this controverted question, and it is the vital question in the case, it becomes necessary to examine the provisions of the charter upon that subject. Sec. 216 of that instrument provides as follows:

"All the officers of the city, except as otherwise provided, shall receive in full compensation for all services of every kind whatsoever rendered by them, the amount of salaries that may be fixed by ordinance payable in city warrants at the end of each calendar month, but in no case

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Syllabus.

shall said salaries exceed the following amounts: . . .
City controller, \$4,000 per annum."

To our minds it seems plain that the charter committee did not intend or undertake to fix the appellant's salary, but only undertook to limit the power of the city council as to the amount to be designated by it. And this being so, and the city council having no right or authority to establish, by ordinance or otherwise, the compensation to be received by appellant, it follows that there was no error committed by the court below in dismissing the action; and the judgment is, therefore, affirmed.

DUNBAR, C. J., and STILES and SCOTT, JJ., concur.

HOYT, J., dissents.

[No. 1094. Decided January 31, 1894.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES
E. MYERS, *Appellant*.

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CRIMINAL LAW — INFORMATION — CHARGING DIFFERENT CRIME
THAN COMMITMENT — FAILURE OF ACCUSED TO TESTIFY — IN-
STRUCTIONS.

The fact that an information does not charge the same crime as that upon which the accused was committed upon the hearing before a justice of the peace is no ground for setting aside the information.

Where the accused in a criminal prosecution fails to testify in his own behalf, it is the duty of the court, under §1307, without an affirmative request therefor, to charge that no inference of guilt should arise against the defendant on account thereof. (SCOTT and HOYT, JJ., dissent.)

Appeal from Superior Court, Asotin County.

M. M. Godman, S. G. Cosgrove, and George W. Bailey,
for appellant.

M. F. Gose, Prosecuting Attorney, and *James A. Haight*,
for The State:

The omission of the court to instruct the jury upon any particular point when the same is not definitely requested is not the subject of an exception, and no error can result therefrom. *People v. Gray*, 5 Pac. 240; *Minich v. People*, 8 Col. 440; *People v. Hann*, 44 Cal. 96; *People v. Collins*, 48 Cal. 277; *People v. Ah Wee*, 48 Cal. 237; *People v. Biles*, 6 Pac. 120; *State v. Hing*, 16 Nev. 307; *State v. McLane*, 15 Nev. 345; *State v. Carnahan*, 17 Iowa, 256; *State v. Grady*, 83 N. C. 643; *Frye v. State*, 7 Tex. App. 94; *People v. Sheldon*, 68 Cal. 434; *State v. Viers*, 48 N. W. 732; *Holt v. State*, 47 Ark. 196; *Sullivan v. State*, 44 N. W. 647; *State v. Kirkpatrick*, 63 Iowa, 554; *State v. Stevens*, 67 Iowa, 557; *Grubb v. State*, 117 Ind. 277; *People v. Flynn*, 15 Pac. 102.

The opinion of the court was delivered by

DUNBAR, C. J.—The information upon which the appellant was tried, convicted and sentenced to hang was as follows:

“Charles Myers is accused by the prosecuting attorney of Asotin county, State of Washington, by this information, of the crime of murder in the first degree, in causing the death of a person by feloniously, willfully and maliciously setting fire to a certain structure used and occupied as a place of abode and known to be occupied at the time of setting such fire, committed as follows, to wit:

“That the said Charles Myers, in the county of Asotin, in the State of Washington, did, on the 15th day of March, A. D. 1893, then and there unlawfully, feloniously, willfully and maliciously set fire to and burn a certain wooden structure of one Annie Myers, and of the value of five hundred dollars, then and there situate, and which structure was then and there used and occupied as a place of abode by said Annie Myers and one Frank Sherry, and by divers other persons to the informant and attorney unknown; by

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reason and by means of which said unlawful, felonious, willful and malicious setting fire to and burning of the said structure by him, the said Charles Myers, in the manner and at the time aforesaid, the said Frank Sherry, who was at the time aforesaid present in and occupying said structure and premises as aforesaid at the time the said Charles Myers so unlawfully, feloniously, willfully and maliciously set fire to and burned said structure, as he, the said Charles Myers, then and there well knew, was so mortally injured and burned by the said fire, and the flames thereof, so, as aforesaid unlawfully, feloniously, willfully and maliciously set to the said structure by the said Charles Myers, that the death of him, the said Frank Sherry, resulted and ensued therefrom, to wit: From said fire and burning in said county of Asotin, in said State of Washington, on the 15th day of March, 1893. And the said Charles Myers, in the manner and form aforesaid, him, the said Frank Sherry, did then and there kill, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the laws of the State of Washington."

The appellant moved the court to set aside the information on the ground that the same charged the appellant with a different crime than that for which he was held to answer. After trial, motion for a new trial was made, based upon the following grounds:

"1. Error of law occurring at the trial, and excepted to by the defendant.

"2. Error of the court in overruling the motion of defendant to set aside the information.

"3. That the court erred in failing to instruct the jury that no inference of guilt should arise against the defendant on account of his failing to testify as a witness in his own behalf.

"4. That said verdict is contrary to law and evidence.

"5. The court erred in refusing to give instructions asked by defendant.

"6. The court erred in giving to the jury instructions over the objections of the defendant."

We think no error was committed by the court in overruling the motion to set aside the information, as no particular form of complaint is required before a justice of the peace sitting as a committing magistrate, and we know of no law requiring the information to charge the same crime as that named in the commitment. We think the information in this case sets forth facts sufficient to put the appellant on his defense for murder. The statute provides that if death ensues from certain acts the person guilty of the commission of such acts shall be guilty of murder in the first degree. It is a statutory crime, denominated murder; and the fact that the commission of other acts will also constitute murder does not militate against the power of the legislature to provide a punishment for this particular crime and to give it any name it sees fit. The information, we think, meets the requirements of the statute, and that the defendant was thereby fully advised of the crime of which he was charged.

We think, however, there is merit in the third error alleged by the appellant, viz., that the court erred in failing to instruct the jury that no inference of guilt should arise against the defendant on account of his failing to testify in his own behalf. It appears from the record that the defendant in this case did not testify, and that such instruction was omitted by the court. This question has been squarely decided by this court in *Linbeck v. State*, 1 Wash. 336 (25 Pac. 452). In that case this court said:

“The defendant was not sworn as a witness in his own behalf, and the court failed to instruct the jury as required by statute that from such fact no inference of guilt should be drawn. We think this was error. The statute in question makes it the duty of the court to give such instruction, irrespective of the action of the defendant in relation thereto, and while we do not now hold that the right to have this instruction given may not be waived by some express act of the defendant to that end, we do hold that

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the simple fact that he remained silent did not amount to such waiver."

Respondent makes an attempt to distinguish the case at bar from the case of *Linbeck v. State*, *supra*, by asserting that in this case counsel for the defendant asked certain specific instructions, but did not ask for the instruction which was omitted by the court. The asking for other instructions certainly could not be held to be a waiver, "by express act," of the right to have the jury instructed on this question in accordance with the provisions of the statute. We are satisfied with what was said in *Linbeck v. State*, and even if the case had not been decided by this court, would decide now on principle that the defendant was entitled to this instruction without affirmative request on his part.

Most of the cases cited by the respondent merely sustain the general proposition that where the law requires the court to instruct the jury upon the law, the failure of the court to do so in the absence of request by defendant is not error. This general proposition, we think, cannot be disputed; but the statute in this case goes beyond that. It attaches so much importance to this particular instruction that it singles it out, and calls it to the especial attention of the court, recognizing the fact that the jury would naturally infer guilt where the defendant did not testify in his own behalf. Whether they should not rightfully infer such guilt is a question which should be addressed to the legislature, and that question has been passed upon by that body.

There are, however, some cases that sustain respondent's contention, and are decided squarely upon the question at issue, but they do not seem to us to be well considered cases, or to be based upon sound reasoning. In *State v. Stevens*, 67 Iowa, 557 (25 N. W. 777), the court says:

"The defendant did not testify in his own behalf. His

counsel now urge that the court erred in not instructing the jury that this fact was not to be considered to his prejudice. Had such instruction been requested it doubtless would have been given. In the absence of this request we do not think it was the duty of the court to allude to the matter. It cannot be presumed that defendant's case was prejudiced by his silence, in the absence of any allusion thereto by the state, the court, or any person connected with the case."

This is all that is said on the subject by that honorable court. It does not appear whether the statute of Iowa was as mandatory as ours; but if so, then certainly the language of the court, "we do not think it was the duty of the court to allude to the matter," was unwarranted and wrong, for the language of the statute is: "It shall be the duty of the court to instruct the jury that no inference of guilt shall arise against the accused if he fail or refuse to testify as a witness in his own behalf." It does not say it is its duty when its attention is called to it, or when it is requested so to instruct the jury by the defendant; but plainly that it is its duty to so instruct. It seems to us there can be but one interpretation placed upon the plain language of the statute.

In *Grubb v. State*, 117 Ind. 277 (20 N. E. 257), after the argument in the cause had closed, and after the court had instructed the jury, the appellant asked the court to give the jury the following instruction: "The defendant has not testified as a witness, in his own behalf, in this cause. It was competent for him to do so. This fact shall not be considered by you or commented upon by the jury in making your verdict," and the defendant excepted. The supreme court of that state held that, inasmuch as the instruction was not asked before the argument was made and the case was closed, it was not error of the court to refuse such instruction. There is no discussion whatever in this case of the principle involved here.

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In *People v. Flynn*, 73 Cal. 511 (15 Pac. 102), the question is disposed of thus:

“It is next contended that sundry errors were committed by the court to the manifest prejudice of the defendant. The defendant did not take the stand as a witness in his own behalf, and the court did not instruct the jury in reference to his failure to do so. It is claimed that ‘it was the duty of the court to charge the jury that no presumption of guilt followed from his failure to testify in his own behalf, and that they could not consider his failure to testify in arriving at a verdict.’ It does not appear from the bill of exceptions that any such instruction was asked. If counsel for defendant desired such an instruction to be given, they should have asked it at the proper time; and as they failed to do that they cannot now be heard to complain.” Citing *People v. Hann*, 44 Cal. 100; *People v. Ah Wee*, 48 Cal. 239.

By reference to the cases cited, and on which the decision was evidently based, it will be found that this question was not in any way involved. There the court neglected to instruct the jury upon the subject of justifiable homicide where there was no special provision for such instruction. And so with all the cases sustaining courts where this specific instruction has not been given; they have based their decisions upon the decisions of other courts sustaining the general proposition, which is not disputed, that where the law requires the courts generally to instruct upon the legal questions involved that it is not error for the court to neglect to so instruct where the instruction is not asked for by the defendant. Such cases, it can plainly be seen, are no basis whatever for decisions on questions of the kind at bar where the law has attached so much importance to this particular instruction, and has called it especially to the attention of the court and given it specially into its charge.

It is insisted by the respondent that this was a mere oversight on the part of the court, and that it should be construed like any other principle of law applicable to

criminal law, such as the presumption of innocence, reasonable doubt, and the admissibility of evidence, etc.; but, as we have before said, the prominence which the law gives to this particular instruction removes it from the column which embraces the other general propositions. This court has no right to conclude that this omission of the court was not largely instrumental in the conviction of this defendant. It would be a very natural thing for the jury to take into consideration the silence of the defendant when he was charged with this crime, and to use it most tellingly against him. The defendant's rights are not to be subjected to the ignorance or carelessness of his attorneys who may not know of his rights in this respect, or may not be watchful of them. On the other hand, if the defendant's counsel is learned in the law, he has a right to presume that the court will do its duty, and comply with the plain provisions of the statute in relation to criminal trials.

It is argued that, if the law is construed as mandatory, it would be a trap set for courts who might forget to give this instruction. It might possibly happen that a court would forget to swear a jury to try a cause, or forget to do many things which would absolutely render void and illegal all subsequent proceedings; but that would be no reason for depriving the defendant of the rights and safeguards which the law has seen fit to clothe him with, and throw around him.

So far as the instructions of the court are concerned, while we are not willing to say that the case should be reversed for the errors therein alleged, the following language of the court, viz.—

“In many instances circumstantial evidence is the best in the world, for while an individual claims to have seen an act committed he may in fact not have seen it committed. It is more improbable that these independent facts mentioned all tending in the same direction be false, because in direct testimony there is opportunity for false-

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hood, while in circumstantial evidence from the multitude of circumstances which are produced of the subject of a position taken by the prosecution, there is more improbability of falsehood,"

we think goes very nearly stating the case too strongly in favor of the potency of circumstantial evidence.

It is tenaciously urged by the appellant that the testimony of the state, uncontradicted, is not sufficient to sustain the judgment, but as we are not aware what evidence the state might be able to produce at another trial, we will not now pass upon that question.

For the error above specified the judgment will be reversed, and the cause remanded with instructions to grant a new trial.

ANDERS and STILES, JJ., concur.

SCOTT, J. (*dissenting*).—I am unable to agree with the majority of the court as to the effect of § 1307 of the Code of Procedure. It seems to me the only effect of this section is to make the instruction in question a part of the law of the case, which it would not be otherwise. Furthermore, it is a general rule that points upon which error is sought to be founded must be raised at the first opportunity. It appears in this case, not only that there was no request upon the part of the defendant for such an instruction, but that he took no exception to the failure of the court to give it.

The rule aforesaid is strengthened here by our statute, § 400 of the Code of Procedure, relating to new trials, the eighth subdivision of which provides that a new trial may be granted for error in law occurring at the trial, and accepted to at the time by the party making the application. See, also, Laws 1893, p. 113, § 7.

If the failure to give this instruction was error, it was an error in law occurring at the trial, and in order to have

availed himself of it, the defendant should have excepted thereto at the time. The first time the point was called to the attention of the court was in the motion for a new trial, and there having been no exception taken to the failure of the court to so instruct, there was no foundation for any error thereon in said motion.

It may be a matter of doubt whether such an instruction is of any benefit to the defendant in thus specially calling attention to his failure to testify at the trial. Anyhow, it can only be contended that such instruction was intended for his benefit, and he should have a right to say as to whether the same should be given. If the court is compelled to give it by his remaining silent, it would impose the burden on the defendant of notifying the court not to give such instruction if he did not want it.

While the rights of defendants in criminal actions are jealously guarded, the object of the law is, nevertheless, to secure justice, and technicalities with no legal or meritorious foundations should not be allowed to defeat it. There is reason in the rule requiring questions on which error is claimed to be raised at the first opportunity, and the opportunity was presented here when the charge of the court to the jury was concluded. An exception to the failure to give this request at that time would have given the court an opportunity to recall the jury and instruct them with reference thereto, and thus the expense of a second trial and the delay incident thereto would be avoided and the rights of the defendant fully protected. In other instances, if the court fails to instruct as to any particular branch of the law of the case, it is a well settled rule that error cannot be founded thereon unless the court has been requested to give such instruction; and I can see no good reason why the same should not apply to the instruction in question. Nor do I think that the statute intended to lay down any different rule with regard to this particular matter.

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Syllabus.

If the case of *Linbeck v. State*, *supra*, is to be interpreted as holding that it is unnecessary for the defendant to except to the failure of the court to give this instruction, it should be modified as authority. In fact, the better practice would be not to require the court to give the instruction unless a request is made therefor by the defendant. But, in any event, there should be an exception to such failure, in order to lay any foundation for error.

I find no error elsewhere in the record, and am of the opinion that the judgment of the court below should be affirmed.

HOYT, J., concurs.

[No. 1130. Decided January 31, 1894.]

GEORGE F. TILZIE, *Respondent*, v. JAMES HAYE AND
SARAH E. HAYE, *Appellants*.

DEDICATION OF STREETS—EFFECT OF DESIGNATION ON PLAT—
EVIDENCE.

Where a recorded plat of lands contains a description of them by metes and bounds, the fact that the plat designates a street thereon as lying upon one side, but beyond the limits of the land described, creates a dedication of such street by implication merely, which presumption may be rebutted by evidence tending to show an intention otherwise.

In an action for breach of covenant of possession, wherein the complaint alleges a statutory dedication of the land in dispute by recorded plat, proof of subsequent conveyances recognizing the plat filed is irrelevant for the purpose of establishing dedication by estoppel.

Appeal from Superior Court, Chehalis County.

T. D. Scofield, for appellants.

Linn & Bridges, and *J. C. Cross*, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—This is an action brought by the respondent in the superior court of Chehalis county to recover damages for a breach of covenant upon the sale of a certain piece of land claimed to have been located in a certain street known as Broad street, in the city of Montesano.

On April 12, 1888, the appellants laid out an addition to the city of Montesano, describing the same in their deed of dedication by metes and bounds. The plat of the addition filed in the auditor's office in connection with the deed of dedication shows twelve lots, 50 by 105 feet, with an alley running east and west midway between the lots, ten feet wide. The width and depth of the respective lots, and the numbers of the same, are designated on the plat, together with the width of the alley, the words marked in the alley being "10 feet alley." On the east boundary of the lots are the words "4 Street," with the figures "30" indicating the width of the street. Adjoining the said lots on the north a space is left, and the words "Broad St." are marked on the plat, with some pencil dots north of the words "Broad St." Some time after the deed of dedication and plat were filed, the appellants deeded to the respondent certain lands located north of the said northerly boundary line of the said plat, and falling within the space occupied by Broad street, if such street had any existence by reason of the filing of the plat aforesaid; and these are the lands which are the subject of this action.

Many questions were raised upon the trial of this case which, under the disposition which we are compelled to make of it, it will not be necessary for us to discuss here. At the conclusion of respondent's testimony, appellants moved for a non-suit, which motion was overruled by the court. Appellants then sought to introduce testimony showing that it was not the intention of the appellants to dedicate any street north of the plat, which evidence

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was objected to by respondent, and the objection was sustained by the court. The court then instructed the jury to bring in a verdict for the plaintiff in accordance with his prayer.

This judgment in any event will have to be reversed, for if there was a dedication of Broad street at all, it was plainly only an implied dedication, and, under all the authorities, the intention to dedicate in such case can be rebutted by testimony. The rule relied upon by respondent, that whether a plat contains a dedication of a strip of ground to the public is a question of law for the court to determine, is confined to cases where there was an express dedication by acts done which the dedicator would not be allowed to dispute, and where the only question could be, whether such acts constituted in law a dedication. In this case it must be borne in mind that the deed of dedication describes the land dedicated by metes and bounds, and that the land which respondent contends was dedicated falls outside of these metes and bounds, so that it can only be by implication, if at all, that appellant can be held to have dedicated such land. That being true, then, under all the authorities, he would have a right to rebut this implication by evidence tending to show his intention.

The cases cited by the respondent only have an application to express dedication. The law cited by the respondent from Dillon on Municipal Corporations, § 628, that "an incomplete or defective statutory dedication will, when accepted by the public, or when rights are acquired under it by third persons, operate in favor of the public and of such persons, respectively, as a common law dedication by the owner," has reference to defects in the manner of dedication, viz., whether the statutory requirements have been complied with in determining the question of what particular land was dedicated. This is plainly ascertained by referring to the authorities cited by the learned author.

The ordinary cases, where the question raised is, whether or not certain strips of land have been dedicated as streets, are cases where the land in dispute is within the boundaries of the land dedicated by the deed. There the dedicator would be strictly bound by any marks or indications on the plat which would lead the purchaser to believe that such dedication had been made; but such is not this case, and we have looked in vain for a case where a dedication has been held good where the plain language of the deed showed that the street claimed to have been dedicated was outside of the metes and bounds of the plat.

We say, then, that the mere appearance of the words "Broad St." would not be sufficient to raise the conclusive presumption that the statutory law has been violated, which provides that a plat of a town must give the respective widths of all streets, and that the same shall be recorded under like regulations as are provided for recording the original plats of towns.

The introduction of the deed to Holman was entirely irrelevant under the pleadings in this case, for it is a statutory dedication, and none other, that the complaint charges. It alleges the dedication on the 12th day of April, 1888, and it is nowhere alleged that the dedication was made by subsequent acts recognizing the plat filed, and the proof, of course, must be confined to the allegations. There being absolutely no proof of the dedication of Broad street, more than was shown by the record, and the record, construing the plat and the deed of dedication together, conclusively convincing us that, as a legal proposition, there was no dedication whatever of the land described in the complaint, the judgment will be reversed, and the cause remanded to the lower court with instructions to grant defendant's motion for non-suit.

HOYT, ANDERS and STILES, JJ., concur.

SCOTT, J., concurs in the result.

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Opinion of the Court — HOYT, J.

[No. 922. Decided February 2, 1894.]

M. REINHART, *Appellant*, v. GEORGE A. GREGG, *Respondent*.

STATUTE OF FRAUDS — PAROL CONTRACT FOR SALE OF BUILDING
— PERFORMANCE OF CONTRACT.

Where the owner of a building upon the land of another makes a parol contract of sale thereof to the land owner, and remains in possession thereof as a tenant, there is a sufficient performance of the contract of sale to take the case out of the statute of frauds.

Appeal from Superior Court, Lewis County.

Daniel C. Millett, and Henry S. Elliott, for appellant.
Reynolds & Stewart, for respondent.

The opinion of the court was delivered by

HOYT, J. — Appellant sought by this action to recover the amount alleged to be due upon a sale of personal property to the respondent. The property consisted of certain buildings owned by the appellant, and situated on the land of the respondent. The price agreed to be paid therefor was more than fifty dollars, and there was no memorandum of writing evidencing the sale. It was, therefore, void under the statute of frauds, unless there was such a delivery by the appellant and acceptance by the respondent as to satisfy the requirements of such statute.

At the close of the testimony of the plaintiff the court below granted a motion for non-suit on the ground that such testimony was not sufficient to warrant the submission to the jury of the question as to whether or not there had been such delivery and acceptance. To reverse this ruling, this appeal has been prosecuted. It sufficiently appeared from the proofs that plaintiff was the owner of the buildings with the right to remove them from the land

of respondent any time before the first day of January, 1892, and that before that date he had several conversations with the respondent in reference to a sale of the buildings to him. Appellant claims that what passed between the parties at the time of the last conversation was sufficient to constitute a sale. In reference to that question the testimony of appellant was substantially as follows:

“Q. What did you do in regard to those buildings on or about the first day of January, as between you and Mr. Gregg, the defendant in this case? A. I went in as his tenant.

“Q. State the facts as to your going in. A. Some time prior to the first day of January, I met Mr. Gregg in the rear of the building occupied by Mrs. Noftager, as a grocery store, and I then proposed to sell him the buildings for six hundred dollars.

“Q. What buildings? A. The buildings that J. D. Rice & Co. occupied as a store prior to the first day of January. He to take the buildings for six hundred dollars, and I to take possession of them until I closed out the stock that I had in there; he to take twenty dollars a month rental from the purchase price of the buildings, and whenever I got through with the use of the buildings he to pay me the difference between twenty dollars a month for the time occupied and six hundred dollars, the purchase price. And he answered all right.

“Q. What, if anything, did you do next? A. I went in the buildings.

“Q. Under that agreement? A. Under that agreement.

“Q. How long did you occupy the premises?

“Counsel for defendant then admitted that they were occupied by the plaintiff from the first day of January to the 22d day of May, 1892.

“Q. During that time, what, if anything, did you do about the rent? A. I did nothing at all.

“Q. Did the defendant at any time demand the rent for these buildings? A. Nothing done whatever. There was never any demand made on me for rent.”

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Appellant further testified that some time after he had gone into possession of the buildings as the tenant of Mr. Gregg, he had a conversation with him in which he stated that he hoped to be able to close out the remainder of his goods at an early day; that upon his making such statement respondent said that he must give him some notice so that he could raise the money to pay the balance due for the buildings.

Did this testimony so far establish the delivery of the property by appellant and an acceptance thereof by the respondent as to authorize the submission of that question to the jury? That such question is ordinarily one of fact to be decided by the jury, and not one of law to be passed upon by the court, is well established by the authorities. See Benjamin on Sales, §§ 144-5; *Smith v. Stoller*, 26 Wis. 671; *Mason v. H. Whitbeck Co.*, 35 Wis. 164.

Such being the rule, the court committed error in taking this question from the jury, if any reasonable construction of the testimony on the part of the plaintiff would establish the fact that there had been a delivery and acceptance. If the delivery and acceptance was the best that could reasonably be expected under all the circumstances, it would take the case out of the statute of frauds. As to all bulky articles not capable of actual, manual delivery, there may be a constructive delivery which will be perfectly good. Between the parties to the transaction there may be a legal delivery and acceptance without any actual change of possession. One may sell personal property and remain in possession thereof as the bailee of the purchaser, and the sale be entirely valid. See Benjamin on Sales, § 182; *Janvin v. Maxwell*, 23 Wis. 51; *Snider v. Thrall*, 56 Wis. 674 (14 N. W. 814); *Smith v. Bryan*, 5 Md. 141.

That the possession of a tenant of a building is the possession of the landlord, is too well established to require the citation of authority. It will follow that if there was

anything in the testimony of appellant that would warrant the jury in finding that on the first day of January, 1892, he went into possession of the buildings as the tenant of the respondent, the motion for non-suit should have been denied. If he assumed the relation of tenant, his possession became that of the respondent. If respondent assumed the relation of landlord he accepted the possession of the buildings.

In our opinion, there was sufficient testimony to warrant the jury in finding these facts, and that the question as to whether or not there had been a delivery and acceptance should have been left to it.

Judgment must be reversed, and the cause remanded with instructions to overrule the motion for non-suit, and proceed with the cause.

DUNBAR, C. J., and STILES, SCOTT and ANDERS, JJ.,
concur.

[No. 974. Decided February 6, 1894.]

THE STATE OF WASHINGTON, *Appellant*, v. JAMES BUTLER,
Respondent.

CRIMINAL LAW—SOLICITATION TO COMMIT ADULTERY.

Solicitation to commit adultery is not indictable as an attempt to commit the crime.

Appeal from Superior Court, Douglas County.

E. K. Pendergast, Prosecuting Attorney, and *James A. Haight*, for The State.

The opinion of the court was delivered by

SCOTT, J.—The defendant was charged with attempting to commit adultery, and was tried and convicted. The body of the information is as follows:

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“Comes now E. K. Pendergast, prosecuting attorney for Douglas county, in the State of Washington, and by this, his information, as provided by law, charges one James Butler with the crime of attempting to commit adultery, in the following manner, to wit:

“He; the said James Butler, on the 3d day of September, A. D. 1892, in the county of Douglas and State of Washington, did, unlawfully, willfully, maliciously and feloniously intend then and there to have carnal knowledge of the body of one Caroline Skett, the lawful wife then and there of one Julius Skett, who was then alive; and the said James Butler, in pursuance of the said unlawful, willful, malicious and felonious intent, then and there, falsely, wickedly, unlawfully and maliciously, by means of promises of the payment of money and by direct invitation by word of mouth, and by laying on of hands by the said James Butler upon the person of the said Caroline Skett in a lewd and lascivious manner, and in the absence of all other persons, except the said James Butler and the said Caroline Skett, and by various other means, did solicit and incite and endeavor to persuade and procure the said Caroline Skett to have sexual intercourse then and there with him, the said James Butler, and the said James Butler was then and there the lawful husband of one certain person other than the said Caroline Skett, and whose true name is to said prosecuting attorney unknown. All of which is contrary to the statute in such case made and provided, and against the peace and dignity of the State of Washington.”

A motion in arrest of judgment, on the ground that the information did not charge any offense, was made, which the court granted, and ordered the defendant discharged. The state appeals. No brief has been filed by the respondent. From the argument of appellant it seems that some question was raised as to whether adultery is a crime in this state, but without going into the question as to whether our statutes upon this subject, which were enacted while we were under a territorial form of government, were repealed by virtue of certain congressional legislation

affecting the territories, we will, for the purposes of this case, take it for granted that they are in force. No statement of facts was settled, and the testimony introduced at the trial is not here.

The only question presented and argued by appellant is as to whether solicitation to commit adultery is an attempt to commit adultery. It is not contended that Caroline Skett was a consenting party, or willing to commit the act with the defendant. The information contains no such allegation; and the case stands as though she was an unwilling and resisting party. It is not contended that there was any act on the part of the defendant going to an attempt beyond soliciting the said Caroline Skett, and endeavoring to obtain her consent. Is mere solicitation an attempt to commit adultery? It being impossible for one alone to commit adultery, as that requires the coöperation of two persons, it would seem to follow logically that one acting singly could not make an attempt. One person could no more attempt to commit adultery than he could attempt to commit a riot, which, under our statutes, requires the participation of three or more persons. The instances given in the books where the solicitation of another to commit a crime is held to be an offense generally relate to those acts or crimes which can be performed or committed by one person, or where the solicitation to commit the crime is an offense in itself, as distinguished from an attempt.

It is urged that a person may be convicted of adultery, or of an attempt to commit adultery, although not a direct participant in the act, by reason of aiding or abetting, but in such a case where an attempt is charged against such third person it should appear that there were two persons willing to commit the act of adultery, and that something was done in the way of an attempt.

The cases upon this subject are very limited in number.

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The case of *State v. Avery*, 7 Conn. 266, cited by counsel for appellant, which was decided in 1828, does not sustain his contention. That case was based upon a letter sent by the defendant to the wife of another man, containing words importing that she had acted libidiously towards the writer, and inviting her to an assignation for adulterous purposes, and it was held that the writing and sending of such letter was libelous. It was further said that it was immaterial to inquire whether the facts stated in the information amounted to a libel, or a solicitation to commit a greater crime, for if they constituted an indictable offense within the jurisdiction of the superior court, it was sufficient for the purposes of that case. It was not decided that solicitation was an attempt to commit adultery.

In *Smith v. Commonwealth*, 54 Pa. St. 209, decided in 1867, it was held that such solicitation did not amount to an attempt. A distinction has been sought to be drawn in this particular to the effect that solicitation to commit adultery is indictable as an attempt in those states where adultery is a felony, which was the case in the State of Connecticut, while in Pennsylvania adultery was but a misdemeanor. The distinction attempted to be drawn, it seems to us, is not sound in principle. It is based on the ground that in trivial misdemeanors the law will look upon an attempt to commit them as not of sufficient gravity to justify or call for punishment. The decision of the case last cited, however, was not founded upon this distinction, although it recognizes the fact that such a one has been sometimes made, in citing *State v. Avery*. The court evidently entertained a different view. The opinion says:

“An attempt to commit a misdemeanor is a misdemeanor, whether the offense is created by statute, or was an offense at common law. These were the words of Baron PARKE, in the case of *Rex v. Roderick*, 7 C. & P. 795, delivered in the year 1837. They have been adopted by the compilers

on criminal law: 1 Russ. on Crimes, 46; 1 Arch. Crim. Plead. & Ev. 19; Wharton's Crim. Law, 79, 873."

And apparently this had the sanction of the court. The reasons given in that case, showing why solicitation should not be held an attempt to commit adultery, apply with equal force whether adultery be a misdemeanor or a felony. These relate to the difficulty of determining what is a solicitation.

"What expressions of the face," says the court, "or double *entendres* of the tongue are to be adjudged solicitation? What freedoms of manners amount to this crime? Is every cyprian who nods or winks to the married men she meets upon the sidewalk indictable for soliciting to adultery? And could the law safely undertake to decide what recognitions in the street were chaste and what were lewd? It would be a dangerous and difficult rule of criminal law to administer."

If adultery is a crime in this state it is a felony, and if solicitation is an attempt to commit adultery it is a criminal offense here. Sec. 303, Penal Code. It will be observed that this section makes no distinction between an attempt to commit a felony and an attempt to commit a misdemeanor, except as to the degree of punishment, and the distinction above mentioned could not be recognized here even if adultery was but a misdemeanor under the statutes. It may be well to note, however, what some of the courts and law writers have said relating to the subject under consideration.

In the case of *Commonwealth v. Willard*, 22 Pick. 476, it was held that the purchaser of spirituous liquor sold in violation of the statute does not subject himself to any penalty, either at common law as inducing the seller to commit a misdemeanor, or under the statute. It was said in that case:

"It is difficult to draw any precise line of distinction between the cases in which the law holds it a misdemeanor

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to counsel, entice or induce another to commit a crime, and where it does not. In general, it has been considered as applying to cases of felony, though it has been held that it does not depend upon the mere legal and technical distinction between felony and misdemeanor. One consideration, however, is manifest in all the cases, and that is, that the offense proposed to be committed, by the counsel, advice or enticement of another, is of a high and aggravated character, tending to breaches of the peace or other great disorder and violence, being what are usually considered *mala in se*, or criminal in themselves, in contradistinction to *mala prohibita*, or acts otherwise indifferent than as they are restrained by positive law."

In the case of *Commonwealth v. Harrington*, 3 Pick. 26, it was held that the letting of a house for the purposes of prostitution, with the intent that it should be thus used, was an offense at the common law. The keeping of such a disorderly house was not a felony, but a misdemeanor of a high and aggravated character, tending to general disorderly breaches of the peace, and a common nuisance to the community. There was no statute in Massachusetts relating to it.

In Wharton, Crim. Law (9th ed.), § 179, in speaking of solicitations, the author says:

"Are solicitations to commit crime independently indictable? They certainly are, as has been seen, when they in themselves involve a breach of the public peace, as is the case with challenges to fight and seditious addresses. They are also indictable when their object is interference with public justice; as where a resistance to the execution of a judicial writ is counseled; or perjury is advised; or the escape of a prisoner is encouraged." "But," says the author, "is a solicitation indictable when it is not either — (1) A substantive indictable offense, as in the instances just named, or (2) a stage towards an independent consummated offense?" And he says, "the better opinion is that, where the solicitation is not in itself a substantive offense, or where there has been no progress made towards the consumma-

tion of the independent offense attempted, the question whether the solicitation is by itself the subject of penal prosecution must be answered in the negative."

And he maintains that solicitation is not an attempt to commit adultery. In speaking of the subject further, he says:

"For we would be forced to admit, if we hold that solicitations to criminality are generally indictable, that the propagandists, even in conversation, of agrarian or communistic theories are liable to criminal prosecutions; and hence the necessary freedom of speech and of the press would be greatly infringed. It would be hard, also, we must agree, if we maintain such general responsibility, to defend, in prosecutions for soliciting crime, the publishers of Byron's 'Don Juan,' of Rousseau's 'Emile,' or of Goethe's 'Elective Affinities.' Lord Chesterfield, in his letters to his son, directly advises the latter to form illicit connections with married women; Lord Chesterfield, on the reasoning here contested, would be indictable for solicitation to adultery. Undoubtedly, when such solicitations are so publicly and indecently made as to produce public scandal, they are indictable as nuisances or as libels. But to make bare solicitations or allurements indictable as *attempts*, not only unduly and perilously extends the scope of penal adjudication, but forces on the courts psychological questions which they are incompetent to decide, and a branch of business which would make them despots of every intellect in the land. What human judge can determine that there is such a necessary connection between one man's advice and another man's action, as to make the former the cause of the latter? An *attempt*, as has been stated, is such an intentional preliminary guilty act as will apparently result, in the usual course of natural events, if not hindered by extraneous causes, in the commission of a deliberate crime. But this cannot be affirmed of advice given to another, which advice such other person is at full liberty to accept or reject. Following such reasoning, several eminent European jurists have declined to regard solicitations as indictable, when there is interposed between the bare solicitation on the one hand, and the proposed illegal act

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on the other, the resisting will of another person, which other person refuses assent and coöperation."

In a somewhat later work, 1 Bishop, Crim. Law (7th ed.), a partially contrary view is indorsed. This author goes farther. In § 768, he says:

"Though, to render a solicitation indictable, it is, as in other attempts, immaterial in general whether the thing proposed to be done is technically a felony or a misdemeanor; still, as the soliciting is the first step only in a gradation reaching to the consummation, the thing intended must, on principles already explained, be of a graver nature than if the step lay further in advance."

He is of the opinion that solicitation is an attempt to commit adultery as a necessary step or ingredient in the offense. Sec. 767.

The question is a somewhat vexed one under the conflict of authorities relating to the various phases of the subject. The inquiry in this case is not whether solicitation to commit adultery is an offense in itself of a distinct character, but whether it is an offense because it is an attempt to commit adultery. The instances of such solicitation which have been brought to the attention of the courts are but few indeed, extending over a long period of years, but resort can be had to some of a kindred nature, or perhaps more properly, which have a bearing on some of the principles involved.

In the case of *Rex v. Butler*, 6 Car. & P. 368, decided in 1834, sometimes cited, it was said, "An attempt to commit a misdemeanor created by statute is a misdemeanor itself," citing *Rex v. Harris*, 6 Car. & P. 129. In *Shannon v. Commonwealth*, 14 Pa. St. 226, it was held that a conspiracy to commit adultery was not an offense. And in *Miles v. State*, 58 Ala. 390, a similar decision was arrived at. Adultery was but a misdemeanor, however, in that state also, though it is not apparent that any importance was attached to this fact in either of these cases. In

Cox v. People, 82 Ill. 191, it was held that solicitation to commit incest was not an attempt to commit the crime of incest, which was a felony. We have not failed to note the criticism of this case, and the citation it relies on from Wharton's Crim. Law above quoted by Mr. Bishop in his valuable work. But the case also relies on *Smith v. Commonwealth*, and *Commonwealth v. Willard*, *supra*, and these cases are authority as we view them, with other authorities herein cited, on the ground that the distinction mentioned sometimes drawn between attempts to commit felonies and attempts to commit misdemeanors, or between attempts to commit grave as distinguished from trivial misdemeanors, is not a well established one, nor well founded when viewed merely as an attempt and not as a substantive offense.

Now it seems to us that solicitation to commit adultery is no part of the act of adultery itself, and consequently cannot be held to be an attempt. What is it? It involves the expression of a desire and a willingness on the part of one person to commit the act of adultery with another, and an attempt to get that person's consent, but no more. Follow it a step farther. Suppose the consent of the other person is obtained, and in pursuance of it, if there is no immediate opportunity to gratify the then mutual desire, a conspiracy is entered into to commit the offense between these persons, which involves the expressed consent and agreement of both of them, and some understanding between them as to when and where the offense shall be committed, and the naming of a propitious time and place to commit it. It seems that this would be much more in the way of an attempt than the case presented here, and if that does not amount to an offense or an attempt, how can it be said that such an intention and willingness, coupled with solicitation upon the part of one person only, can amount to an attempt to commit the offense?

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We are of the opinion that the judgment of the superior court should be affirmed.

DUNBAR, C. J., and HOYT, STILES and ANDERS, JJ.,
CONCUR.

[No. 904. Decided February 7, 1894.]

ANNIE J. LANDERS, *Appellant*, v. JOHN F. MCINTYRE *et al.*, *Respondents*.

SPECIFIC PERFORMANCE—SUFFICIENCY OF TENDER.

Where a real estate broker, at the time of negotiating a sale, has contracted with the purchaser to purchase back the land in one year at an advance of twenty per cent. upon the price, if the purchaser should so elect, and the purchaser has taken a bond for a deed from the owner of the land in which time was made of the essence of the contract, and full payment has not been made within the stipulated time, the purchaser cannot recover from the broker by offering to have all right and title acquired under the bond transferred to the broker, but the purchaser must tender a deed conveying a good and sufficient title.

Appeal from Superior Court, King County.

Hudson & Holt, for appellant.

Rupert & Fitzgerald, for respondents.

The opinion of the court was delivered by

ANDERS, J.—It appears from the complaint in this action that, on September 23, 1889, the respondents, McIntyre & Plum, a real estate firm, negotiated a sale to J. A. Reid of certain described real estate in the city of Port Townsend, owned by one William Payne. On the same day they entered into a contract with said Reid whereby, in consideration of said purchase, they guaranteed to him that said property would pay him twenty per cent. profit in one year from that date, and thereby bound themselves

to purchase said property at said advance, one year from date, if said purchaser should so elect.

On September 24, 1889, said Payne executed a bond for a deed of said property to the said Reid, in which time was made of the essence of the contract, conditioned that if the obligor therein, on or before the 24th day of September, 1890, should make, execute and deliver unto the said Reid, provided that the said Reid should, on or before that day, pay to the said obligor the sum of \$2,000, with interest thereon at the rate of ten per cent. per annum from date until paid, in the manner therein specified, a good and sufficient conveyance of said property, with the usual covenants of warranty, then the obligation should be void, otherwise to remain in full force and virtue.

On December 6, 1889, the said Reid duly assigned said bond to the appellant. On April 30, 1892, the said Reid assigned and transferred to the appellant all of his right and interest in, and claim under, the aforesaid agreement of September 23, 1889. At the time of the making and delivery of the bond the said Reid paid to the said Payne the sum of \$500, and thereafter paid the further sum of \$875, in accordance with the stipulations of said instrument. Nothing further was paid by him upon the bond.

It is alleged by the appellant that in all these transactions the said Reid acted as her agent, and that the money so paid was paid, in fact, by her as principal. It is also alleged in the complaint that said Reid, on behalf of the plaintiff and at her direction, within and at one year from the date of said guaranty and agreement, did elect to have said defendants purchase the property described in said contract and agreement, and did inform the defendants of the fact of his said election, and did call upon and demand of them that they should comply with the said contract and agreement and take said property and bond for a deed, and did, acting on behalf of said plaintiff, offer to have said

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bond and all right and title acquired thereunder duly transferred and assigned to them. But that the said defendants, in violation of their said contract, failed and refused to purchase the said property or to accept any assignment of said bond for a deed, or to pay to the plaintiff any portion of the sum which they agreed to pay for the said lots under the said contract. A general demurrer was interposed to the complaint, and was sustained, and this ruling is the only error assigned.

From the above it will be seen that neither the appellant nor Reid tendered a deed or even an assignment of the bond to the respondents. Said Reid simply offered to have said bond and all right and title acquired thereunder transferred and assigned to them. And it is contended on behalf of the respondents that the plaintiff, upon the allegations of the complaint, is not in a position to maintain this action. The respondents, McIntyre & Plum, proposed to purchase the property at the price mentioned in their contract, within one year from the date thereof.

In a contract of this kind, where nothing is said as to the nature and extent of the title to be conveyed, the law implies that a conveyance transferring a good and sufficient title shall be made, and this is not satisfied by a tender of a contract to convey. See *Witter v. Biscoe*, 13 Ark. 422; *Ankeny v. Clark*, 1 Wash. 549 (20 Pac. 583).

At the time this offer was made the title to the property in question was still in Payne, and he was the only person who could have made a conveyance of the same; and according to some of the authorities such a contract as the one now under consideration would not be fulfilled even by a tender of a valid deed from a third person. *Hussey v. Roquemore*, 27 Ala. 281. And, besides, the appellant and her agent, Reid, having failed to comply with the conditions of the bond, were not in a position to enforce a conveyance of the premises, even from Payne himself.

Without undertaking a discussion of the question as to whether the contract between McIntyre & Plum and Reid was assignable or not, we are of the opinion that the complaint in this action does not state facts sufficient to constitute a cause of action against the respondents, and that the demurrer thereto was properly sustained.

The judgment is affirmed.

DUNBAR, C. J., and STILES, SCOTT and HOYT, JJ., concur.

[No. 992. Decided February 7, 1894.]

DORA LIEBENTHAL, *Respondent*, v. JAMES H. PRICE, *Sheriff, et al.*, *Appellants*.

WRONGFUL ATTACHMENT—EVIDENCE—COMPETENCY—OBJECTIONS.

In an action by a wife for damages for the wrongful attachment of property which her husband had transferred to her in payment of a loan by her to him, and where, for the purpose of proving the *bona fides* of the transaction, she was attempting to show that she had received a certain sum from her father's estate which constituted the loan to her husband, it was not error to admit in evidence a copy of her receipt for the amount to the representative of her father's estate, when the only objection made thereto was that it was secondary evidence, although the original receipt itself would have been inadmissible, if objected to on the ground of incompetency.

Appeal from Superior Court, Pierce County.

Stevens, Seymour & Sharpstein, for appellants.

Crowley & Sullivan, for respondent.

The opinion of the court was delivered by

ANDERS, J.—Some time prior to the month of April, 1891, Max Liebenthal, the husband of the respondent, and one Fournier, were engaged in the cigar and tobacco busi-

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ness in the city of Tacoma, under the firm name of Lieben-
thal & Fournier. This firm was dissolved by mutual
consent on or about the date aforesaid, and Max Lieben-
thal, the husband of the respondent, took his partner's in-
terest in the assets of said firm, and carried on the business
until June 4, 1891. On that day he made a bill of sale of
the contents of the store to the respondent in consideration
of two thousand dollars which he claimed to owe her.
After this bill of sale was made and recorded, the Rosen-
feld-Smith Company, a corporation, brought an action
against Liebenthal & Fournier to recover a balance alleged
to be due for goods sold and delivered, and in that action
a writ of attachment was issued and levied upon the con-
tents of the cigar store by the appellant, James H. Price,
then sheriff of Pierce county. A judgment was thereafter
obtained in favor of the plaintiff, and execution issued, and
the property so attached was sold under said writ of exe-
cution at public auction, and was bid in by the Rosenfeld-
Smith Company, and the proceeds applied in satisfaction
of their judgment. Soon thereafter the respondent insti-
tuted this action for damages alleged to have been sus-
tained by the wrongful levy and sale of the said property.
The claim of the respondent was contested by appellants
on the ground that the bill of sale was fraudulent and void,
and designed as a shield to prevent the property of Lieben-
thal from being appropriated to the payment of his debts.
On the trial the jury rendered a verdict in favor of the
respondent, upon which judgment was subsequently en-
tered.

It is contended here by appellants that the judgment
must be reversed for the reason that the evidence is not of
that clear and satisfactory character which the law requires
in order to establish the good faith of a transaction between
husband and wife. In such cases the burden of proof is
imposed by our statute upon the party asserting the good

faith of such transaction. See Gen. Stat., § 1455. And it is generally held, when transfers of property from husband to wife are questioned on the ground of bad faith, that the payment of a valuable consideration must be shown by proof of the most satisfactory character. Bump, *Fraudulent Conveyances*, p. 306; *Horton v. Dewey*, 53 Wis. 410 (10 N. W. 599); *Fisher v. Shelver*, 53 Wis. 498 (10 N. W. 681).

It is shown by the testimony of the respondent that some years prior to the making of the bill of sale, she loaned her husband three thousand dollars, which she had procured from the representatives of her father's estate, and that the bill of sale in question was given in part payment of this loan. In this she was corroborated by her husband; and her brother also testified that she received said sum from the estate of her father. No positive testimony was offered to contradict this evidence, but it was attempted to impeach the good faith of the parties to the transaction by showing that Max Liebenthal, at the time the bill of sale was given, was largely indebted to divers parties, and that, on or about the date of the bill of sale, he sold and conveyed other property under circumstances showing an intention to prevent his creditors from reaching it, and that the respondent's testimony concerning this sale, on a former occasion, was, in several particulars, at variance with her testimony upon the trial. The respondent, as further proof that she actually received three thousand dollars from her father's estate, offered in evidence a copy of a receipt which she claimed she had given to the representative of the estate for the money received by her.

It is urged by counsel for appellants that the court erred in permitting this copy to be given in evidence over their objection. A reference to the record discloses the fact that this paper was objected to on the ground that it was incompetent and immaterial, being only a copy, and there-

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fore secondary and not the best evidence; and the objection was urged upon that ground in this court. If the point had been made in the court below that the original receipt, if produced and offered in evidence, would have been incompetent, and not merely that a copy thereof was inadmissible, then its reception would undoubtedly have constituted error. No objection was made that a proper foundation had not been laid for the introduction of secondary evidence, and no error is or could be assigned on that ground. It therefore follows that the copy, under the circumstances, was properly permitted to go to the jury.

While there are some circumstances in evidence having a tendency to show that the bill of sale in question was executed by Liebenthal to the respondent for the purpose, as claimed by appellants, of hindering, delaying and defrauding creditors, yet, in view of the positive testimony in the record, that the transfer was made in payment of a *bona fide* indebtedness, we are unable to say that the evidence, as a whole, was not sufficiently clear and explicit to justify the verdict of the jury. We are not satisfied from the evidence that the respondent, in receiving the bill of sale of the goods in controversy, intended to defraud any of the creditors of her husband, and in the absence of such an intention she should not be deprived of the property so purchased.

Some objections are made in the brief of counsel for appellants to the charge of the court to the jury, but as the instructions given do not appear in the record, we must presume that the law was properly given by the court. In fact, all objections but those we have considered were waived on the argument by the learned counsel for the appellants.

The judgment is affirmed.

DUNBAR, C. J., and HOYT, SCOTT and STILES, JJ., concur.

[No. 1161. Decided February 7, 1894.]

THE STATE OF WASHINGTON, *on the relation of Edward M. Hunt and Frederick Mottet*, co-partners, v. THE SUPERIOR COURT OF CHEHALIS COUNTY *et al.*

RECEIVERS—RIGHT TO PROPERTY HELD UNDER ATTACHMENT.

A receiver appointed by the court under an order directing him generally to take possession of the property of an insolvent corporation takes no title to property of the corporation in the actual possession of the sheriff under an attachment lien, when the sheriff and the lienors have not been made parties to the action in which the receiver was appointed. (DUNBAR, C. J., dissents.)

Original Application for Prohibition.

Greene & Turner, and *J. C. Cross*, for relators.

M. J. Cochran, and *J. B. Bridges*, for respondents.

The opinion of the court was delivered by

HOYT, J.—Only one substantial question is presented by the return of the respondents to the alternative writ of prohibition heretofore issued in this cause, and that is as to the respective rights of the relators, as attaching creditors of a certain corporation, and a duly appointed receiver for said corporation.

The relators obtained a lien upon the property in question by virtue of attachment proceedings, and have maintained such liens by causing the sheriff to retain the actual possession of the property in question from the date of the initiation of such lien. The receiver was appointed in a suit instituted by a stockholder of the corporation, for the purpose of winding up its affairs. Such suit was commenced long after the lien of the relators to the specific personal property had attached, and they were not made parties thereto. Under this state of facts the relators contend that their right to have the sheriff retain possession

8 210
8 659
35*1087
36*1085

8 210
9 47
9 528
35*1087
36*1080
36*1085
8 210
11 65
11 590
35*1087
36* 245
40* 137

8 210
14 328
8 210
83 641
8 210
436 94

of the property and subject it to the payment of their judgment is not affected by the appointment of the receiver.

This question was before this court in the case of *State, ex rel. Machinery Co., v. Superior Court*, 7 Wash. 77 (34 Pac. 430), and, after able argument and careful consideration, a decision in accordance with such contention was reached. The question having been once decided in this court should not be re-opened until it is made affirmatively to appear that such decision was not in accordance with correct legal principles. We have carefully investigated all the authorities cited by the respondents, and the result of such examination has made it unnecessary that we should bring to the aid of our former decision any of the numerous authorities cited in the able brief of the attorney for the relators. The respondents contend that the authorities cited by them establish the doctrine that whenever a receiver is appointed he is entitled to the possession of all the property of the corporation for which he is appointed, regardless of the question as to whether the actual possession of such property is in such corporation or in that of a third person, a stranger to the suit in which such receiver had been appointed.

We are unable to find anything in any of the cases so cited which warrants this contention. The general proposition is laid down in Gluck and Becker on Receivers, Beach on Receivers, High on Receivers, and in the Am. & Eng. Ency. of Law, that a receiver only takes such rights in the property of the corporation as it had at the date of his appointment, or, at most, at the date of the commencement of the action in which the appointment is made; and the author of each of these works cites abundant authority to sustain such general proposition. Among the numerous cases cited by respondents we have been unable to find a single one which goes to the extent of holding that a receiver, without other authority than that of the order ap-

pointing him, had the right to interfere with personal property in the actual possession of third persons under claim of right.

There are some cases which hold that by making such persons parties to the suit in which the receiver was appointed they may be compelled to surrender the property to him and adjudicate their rights in that action; and in some cases the order appointing the receiver has directed him to take possession of certain specifically designated property, and in such cases it has been held that the person holding such property could not question the authority of the receiver under such order. But none of these cases aid the contention of the respondents. The order in this case, in general terms, directed the receiver to take the property of the corporation, and required such corporation to surrender possession thereof, but said nothing as to any specific articles or as to the rights or duties of those not parties to the action; hence, under the general rule referred to, the receiver only took such rights as the corporation had; and as the corporation had no right to interfere with the property in question, it must follow that the receiver could not rightfully assert any claim thereto not subject to the lien of relators and the right of the sheriff to retain possession and proceed in the enforcement of the process in his hands.

There are many cases which hold that a receiver once in possession of property cannot be disturbed in such possession, even by one who has a superior lien thereon. Not only are there many cases which establish this doctrine, but, so far as we know, there is an unbroken line of authority going to that extent. The reason why the possession of a receiver must not be disturbed is, that it is the possession of the court, and its dignity will not allow any one, without its permission, to interfere with that of which it has possession.

But the research which we have been able to give to the subject has not brought to our notice a case in which it has been held that property in the actual possession of a third person, under claim of right, came into possession of the court upon the appointment of a receiver in a suit to which the person in possession of the property was not a party. The case most relied upon by respondents, and which comes nearer to sustaining their contention than any other that has been brought to our attention, is that of *Wiswall v. Sampson*, 14 How. 52. An examination of that case and of the briefs of counsel will show that it went no farther than to establish the well recognized doctrine that a court will brook no interference with property in the actual possession of its receiver. It is contended on the part of respondents that, in the case just cited, the possession of which the court speaks in its decision was simply the constructive possession in the receiver growing out of the fact of his appointment. But it appears clearly from the briefs of counsel that the property was in the actual possession of the receiver. This also appears from the opinion of the court, as the following quotation will show:

“The receiver was appointed on the 27th June, 1845, and on the same day Ticknor, who was in possession of the premises, attorned to him, who held possession until the sale was made in pursuance of the decree. . . . At the time, therefore, of this sale, the receiver was in the possession of the premises, under the decree of the court of chancery.”

Such being the status of the property as to which the court was speaking in deciding that case, it has little weight in support of the contention of respondents. Besides, there was another reason given by the court for its decision, aside from that growing out of the actual possession of the property by the receiver, and that was that the parties attempting to assert a legal right as against his

title had been brought into the action. And from what is said by the court, it is probable that the case would have been decided differently if the one claiming the adverse title had not been made a party to the suit in which the receiver had been appointed. Upon that subject the court speaks as follows:

“We agree, that the person holding the prior legal lien or incumbrance, must have notice, and an opportunity to come in and claim his prior right to the property or interest in the fund before his legal right can be affected; and the proper way is by summons or notice upon the order or direction of the court.”

In a similar manner, every case cited by respondents can be analyzed and abundant reasons for the decisions found without invoking the harsh rule contended for by respondents, that one in the actual possession of property under claim of legal right may be deprived of such possession without any opportunity to be heard in defense of his rights. That the affairs of a corporation can be so changed, by the appointment of a receiver at the instance of one of its own stockholders, as to take a legal right from one claiming property adversely to it, without his being brought into court for the purpose of having his right thereto adjudicated, is so contrary to our understanding of what constitutes due process of law that we cannot yield assent to such a doctrine. It is laid down by the text writers to whom we have referred, that under such circumstances a receiver must resort to an action at law to obtain possession. The corporation could only assert its rights to the possession of property thus situated in an action at law, and except when aided by statute the receiver can do no more.

In many states there are express statutory provisions which require all those claiming property of a corporation to yield the same to a receiver or assignee when proceed-

ings for the appointment of such receiver or assignee have been instituted by or on behalf of such corporation. But we have no such statutory provision in this state, and without some aid of this kind we are unable to see any sufficient reason for holding that the appointment of a receiver should authorize him to take possession, without legal process, of property in the adverse possession of another under claim of right.

We are satisfied with what we held in the former case, and, applying it to the facts in this one, it follows that the receiver was not justified in interfering with the possession of the property in controversy, nor with the right of the sheriff to proceed against the same as required by the process in his hands.

The alternative writ must be made perpetual.

ANDERS, SCOTT and STILES, JJ., concur.

DUNBAR, C. J. (*dissenting*).—I am unable to agree with the conclusion reached by the majority. I think, in the first place, the demurrer to the petition should have been sustained; and, in the second place, the answer of the receiver, and the return of the court, conclusively show to my mind that no injury or damage was threatened to the petitioners by the court, or the receiver.

The opinion of the majority starts out with the proposition that the receiver only takes such interest in the property of the corporation as it had at the date of his appointment, or, at most, at the date of the commencement of the action in which the appointment was made; and the case of *State, ex rel. Machinery Co., v. Superior Court*, 7 Wash. 77 (34 Pac. 430), is cited to sustain this proposition. The decision of this point was not necessarily involved in the case above referred to, and the opinion expressed in that case, in my judgment, was wrong, and not borne out by the authorities, and is not consistent with

the orderly administration of courts of equity in settling insolvent estates. This question was, however, before this court in the case of *Meeker v. Sprague*, 5 Wash. 242 (31 Pac. 628), and there it was flatly decided that the party having a mortgage lien must foreclose his lien in the court having jurisdiction of the settlement of the insolvent estate, even where the mortgagee alleged that the property upon which he had a first lien would be charged with a greater proportion of the expenses of the receivership than would be just. In that case all the right that the receiver could take, according to the doctrine announced in the majority opinion in this case, was the right of the equity of redemption, which was all the right that the insolvent corporation had under the law. It is true that the property involved there was real estate, but the doctrine that the receiver only takes the right to the property that the corporation had at the date of his appointment, if tenable at all, must be applied to all the property. Nor was there any attempt made in *Meeker v. Sprague*, *supra*, to distinguish this lien from the lien on personal property, but the decision was based upon the theory that the court would respect the lien, and that it would do exact justice in the premises.

“It cannot for a moment be presumed,” said the court in that case, “in aid of the contention of the appellant that the lower court will not do as full and exact justice to each person or corporation claiming a lien upon any of the property of the defendant corporation when presented in such original suit as it would when presented by means of an independent action. It would be the duty of such court to determine each of the claims presented in said original action by the same rules, and grant to them the same rights, as it would if each of the claimants were a plaintiff in an independent action. While each of them will be adjudicated in the original action, they will be so adjudicated upon the facts of the particular claim as related to the entire property of the corporation. And in the adjustment of the expenses incident to such suit, and of the

services of the receiver, the principles of equity will, of course, be applied. And if any of the liens are upon property over which the receiver has but a nominal control, it will, of course, be the duty of the trial court to see that the holders thereof are protected from having their security, in any material degree, decreased by the costs and expenses incident to the receivership. And upon the question of the effect of the deed from the corporation to the receiver, it seems to us clear that it can in no manner affect the rights of the appellant. Such corporation could not convey to the respondent any of his rights, and the court will see to it that in the final adjustment of the rights of all the claimants, the appellant, together with all others like situated, is protected against any diversion, or attempted diversion, of the property upon which he had a first lien, to the payment of subsequent liens, of whatever nature or kind they may be."

The reading of the return of the court to the alternative writ issued in this case would seem to justify the action of the court considered with reference to the opinion of this court just quoted. A portion of the return is as follows:

"And respondent further says that it was not, nor is it now, doing the things complained of for the purpose and with the intent of destroying and making worthless the said executions of the relators, but that the same should be respected by the said receiver; that the receiver should take and hold the said property subject to whatever right, title and interest in and to the said property the relators had or have by virtue of such executions; that the said receiver should take the said property subject to any and all liens or levies; that the property of the said company should be sold under the direction of this court and managed under its direction, by said receiver, and that any and all money's coming to the said receiver from or out of the said property should go towards discharging and satisfying the executions of relators, if the court should finally decide that the said executions were valid and prior liens thereon."

The doctrine announced in *Meeker v. Sprague*, *supra*, is in harmony with the doctrine that the creditor has no

vested right in methods or remedies. In this case the creditor has a right to make his money out of the property which is the subject of the lien; but he has no right whatever in the particular manner in which the money is to be made. Taking the return of the court to be true, which this court must do, it is seen that the *method* is all that is contended for here by the petitioners; and it is elementary that the writ of prohibition should not issue unless some right is invaded or threatened; and all the right the petitioners have here is the right to be paid out of the first proceeds of the sale, which right will not be denied them by a court of equity. The court will simply direct its receiver to act in the premises, and this court will not, as it said in *Meeker v. Sprague*, *supra*, assume that the property upon which the first lien exists will be charged with a greater proportion of expenses by reason of its settlement by a court of equity.

The receiver is appointed for the benefit of all concerned — the judgment creditor, as well as the other creditors, and the corporation itself; and it is the duty of the court, in the interest of all of the creditors, as well as in the interest of the corporation, which is deprived by the law of the right to settle its own estate, to see that the property is sold in such a way that the best results will be obtained. So, in this case, the creditor is not threatened with loss of any right; but the court, merely to prevent harmful confusion and additional costs, which would be the inevitable result of clashing acts of authority, and for the benefit of all parties concerned, proposes to prescribe the method which in its judgment will obtain the best results.

The citation of authorities on this proposition by the majority I do not think fairly sustains their contention. The rule laid down by Gluck and Becker on Receivers, p. 130, is as follows:

“Persons having liens upon the property, acquired be-

fore the receiver's appointment, have no right to interfere with its possession by the receiver, and, without any application to or adjudication of the court, sell and dispose of it; and sale of property so made is illegal and void."

Citing *Wiswall v. Sampson*, 14 How. (U. S.) 52, a case of which I will hereafter speak.

It is very plain from an investigation of the authorities that the possession of the receiver referred to is a constructive and not an actual possession, the theory of the law being that when the receiver is appointed to administer upon the estate, the possession immediately vests in him. The same author, on p. 134, says:

"The title to property in the hands of a receiver is not in him, but in those for whose benefit he holds it. Nor, in a legal sense, is the property in his possession. It is in the possession of the court, by him as its officer."

And, again, in § 48:

"The receiver of an insolvent corporation, while, as a general rule, he is to be regarded as the representative of the corporation, asserting its rights, taking its title, and subject to its liabilities, in one respect occupies a broader position, and represents not only the corporation but also the creditors, and when in any proceeding he occupies exclusively the latter status, may do and under some circumstances must do many things which, if his acts were strictly limited to those of a representative of a corporation, he could not do."

It is plain that if he represents the corporation as well as the creditors, he represents all the interests, and must necessarily have possession of all the property.

It is contended that if possession is yielded up to the receiver, the result will be that the lien will be destroyed; and the establishment of the truth of this proposition is really the only logical ground upon which the writ in this case can issue. But I think that the doctrine cannot be established, either on reason or authority; especially it

cannot obtain here where the answer of the court affirmatively shows that the lien will be respected and maintained until the question of priority is adjudicated.

There is in my mind a great deal of fanciful importance attached to this idea of possession. It is true that under our statutes an attachment levy creates a lien, but it is not the object of the lien to create any right of possession in the creditor. The sole object is to keep the property in *statu quo* to prevent the debtor from disposing of it, or any one else obtaining it, until it can be made to respond to the judgment. When the creditor is sure of this result, he has no cause for complaint whatever, and should not be allowed to interfere with the orderly procedure of the court by captious or arbitrary insistence upon any particular method or mode of procedure.

Wiswall v. Sampson, 14 How. 52, is a well considered case, which in my opinion sustains the contention of the respondent. It does not very clearly appear in this case whether the court is speaking of the actual or constructive possession of the receiver, but it does appear that the court intended to lay down the broad doctrine that the estate of an insolvent debtor, where a receiver had been appointed, must be administered by direction of the court, and that where a lien had been obtained it was not necessary for its perpetuation that the property be sold by legal process, but that such lien would be protected by the court having jurisdiction of the settlement of the estate; and the court lays down the doctrine that the party having a lien must apply to the court for the protection of his rights.

“The effect of the appointment,” says the court, “is not to oust any party of his right to the possession of the property, [and here it must evidently appear that the court was not referring to property in the possession of the receiver at the time he was appointed, but in the possession of the other party,] but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it; and

when the party entitled to the estate has been ascertained, the receiver will be considered *his* receiver, and the master will usually be directed to inquire what encumbrances there are affecting the estate, and into the priorities, respectively." [The italics in the quotation are my own.]

If the receiver is to be considered the *creditor's* receiver, then it is all folly to talk about a creditor's losing his lien by reason of the possession of the receiver.

"When," the court continuing, says, "a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it. This was held in *Angel v. Smith*, 9 Ves. 335, both with respect to receivers and sequestrators. When, therefore, a party is prejudiced by having a receiver put in his way, the course has either been to give him leave to bring an ejectment, or to permit him to be examined *pro interesse suo*. And the doctrine that a receiver is not to be disturbed extends even to cases in which he has been appointed expressly, without prejudice to the rights of persons having prior legal or equitable interests. And the individuals having such prior interests must, if they desire to avail themselves of them, apply to the court either for liberty to bring ejectment, or to be examined *pro interesse suo*; and this, *though their right to the possession is clear*. 1 Cox, 422; 6 Ves. 287."

It would seem that this expression by the supreme court of the United States was sufficiently convincing that it was not attaching any great importance to the question of physical possession. Further quoting Chancellor KENT, in *Codwise v. Gelston*, 10 Johns. 507, the court says:

"But when the law gives a priority, equity will not destroy it; and especially where legal assets are created by statute, as in case of a judgment lien they remain so, though the creditors be obliged to go into equity for assistance. The legal priority will be protected and preserved in chancery."

And still further, showing that the question of posses-

sion was not the basis of this opinion, the court, proceeding, says:

“It has been argued that a sale of the premises, on execution and purchase, occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court, and that the sale, therefore, in such a case should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court, to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And, in order to effect this, the court must administer it independently of any rights acquired by third persons pending the litigation. Otherwise the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless. It is true, in administering the fund, *the court will take care that the rights of prior liens or encumbrances shall not be destroyed*; and will adopt the proper measures, by reference to the master, or otherwise, to ascertain them, and bring them before it. Unless the court be permitted to retain the possession of the fund, thus to administer it, how can it ascertain the interest in the same to which the prosecuting judgment creditor is entitled, and apply it upon his demand?”

There can be but one interpretation of this case, and that is, that the court, under all circumstances, is entitled to the possession of all of the property of the estate; that the receiver as an officer of the court represents not only the creditors, but the estate, and that the whole settlement of the estate, both property that is subject to liens and that which is not, devolves upon the receiver as an officer of the court, and that all priorities will be ascertained and protected by the court.

This was also the doctrine announced by the court of ap-

peals of New York. *Walling v. Miller*, 108 N. Y. 173 (15 N. E. 65). This was a case where the property involved was personal property, and levy was made under execution on the 12th day of May; two days thereafter a receiver was appointed. On the day of his appointment he took possession of the property. According to the theory of the majority, if the sheriff had yielded up the possession of the property to the respondent the lien would have been lost, but the court there seemed to be of a different opinion, for it says:

“The lien of the execution was not destroyed by the appointment of a receiver, but the rights and interests of all parties in the property were thereafter to be adjusted by the court which appointed the receiver, and the property could not be taken out of the possession of the receiver and sold upon the execution without leave of the court. The execution creditor could bring his lien to the attention of the court in the action in which the receiver was appointed, and ask to have the execution satisfied out of the proceeds of the property. But persons having liens upon the property had no right to interfere with its possession by the receiver and, without any application or adjudication of the court, sell and dispose of it, and thus dissipate it and deprive the court of jurisdiction to administer it.”

So that it will be seen that the court, instead of holding that the yielding up of the possession to the receiver would destroy the lien, hold exactly the reverse, viz., that the creditor had no right to retain the possession, thus interfering with the possession of the receiver, but by yielding up to the receiver, the lien of the execution would be protected. In this case the court went so far as to hold a sale of the property made under an execution void, where the levy was made prior to the appointment of the receiver.

But that is just what the petitioners in this case are striving to do, and what this court has said, by the majority opinion, they have a right to do, viz., to interfere with

the possession of the property by the receiver, and sell and dispose of it without any application by the court.

“When a party is prejudiced by having a receiver put in his way, the course has either been, to give him leave to bring an ejectment, or to permit him to be examined *pro interesse suo*. The rule that the possession of a receiver is not to be disturbed extends even to cases in which he has been appointed expressly *without prejudice* to the rights of persons having prior estates; and the individuals having such prior estates must, if they wish to avail themselves of them, apply to the court either for liberty to bring an ejectment, or to be examined *pro interesse suo*; and this although their right to take possession is clear.” 3 Daniels, Chanc. Pl. & Pr. (Perkins’ ed.), p. 2057.

That author states that the same rule applies where an estate has been sequestered. Turning to p. 1314, we find the rule laid down thus:

“The proper course to be pursued by any person who claims title to an estate or to property sequestered, whether by mortgage or judgment, lease or otherwise, or who has a title paramount to the sequestration, is to apply to the court to direct the plaintiff to exhibit interrogatories before one of the masters, in order that the party applying may be examined as to his title to the estate. . . . The mode of proceeding is the same where the property is in the possession of a receiver. 6 Ves. 287. . . . An order for the examination of a party *pro interesse suo* may be obtained, as a matter of course, by the party claiming, but it cannot be granted till after the sequestrators have made a return, because, till then, it cannot appear to the court what is sequestered.” *Id.*

The whole theory of the law, and of the authorities, simply is, that a court of equity which has jurisdiction of the settlement of the estate will protect the liens and priorities of every kind when they are brought to its attention, but that it will do it in the manner best calculated to preserve the interests of all parties concerned. And this doctrine is expressed very concisely in *Glines v. Supreme*

Sitting, Order of Iron Hall, 21 N. Y. Supp. 736, where it was decided that the fact that one, before the appointment of a receiver, levies an attachment upon certain funds does not give him a preference enforceable generally against the receiver as to the judgment obtained, but only a preference in the funds themselves.

A recent case, cited from the supreme court of Texas, (*Ellis v. Vernon Ice, Light & Water Co.*, 4 Tex. Civ. App. 66, 23 S. W. 860), very fully and forcibly sustains the respondent's contention. The court there said:

"It is well established, we think, that, after property has been placed in the hands of the receiver, it is not subject to levy and sale under execution. Being in the custody of the law, through the appointment of a receiver by a court of competent jurisdiction, it cannot be interfered with by process from another court. A party having a claim upon it must intervene in the court of the receivership, and in the case in which the receiver has been appointed, and establish his right in that tribunal, or must obtain leave of that court to bring an independent action. But the question here is, can the sheriff, who has made a levy upon real estate before the appointment of a receiver over it, proceed to sell, and pass the title, after the receiver has been appointed?"

The very statement of this case shows that it is the constructive possession of the receiver that the court is talking about, and that his possession is presumed to follow his appointment.

After reviewing some cases where it was held, as the majority hold in this case, that the receiver only took such title as was conveyed to the receiver by the deed of the party over whose property he was appointed, and that this conveyance passed the property subject to the lien of the judgment under which it was sold, and that, therefore, the purchaser at execution sale took the superior title, the court sums up as follows:

"However that may be, we think *Wiswall v. Sampson*

lays down a doctrine that is founded upon good reason and sound policy. To permit the control of a receiver to be interfered with by virtue of process from another court would be a practice fraught with injustice, and productive of confusion; and that remark applies with especial force to the receivers of insolvent corporations. After all the assets of a corporation have been taken from the hands of its managers, and placed under the control of a receiver, is it just to allow the property to be sold under execution? The court, having deprived the corporation of the power of paying the debt and of avoiding the sale, should, in the interest of all concerned, protect its property from the sacrifice. The receivership does not destroy any liens that may have been acquired before the appointment, but the remedy for their enforcement should be sought in the court in which the whole estate is being administered."

In view of the logic of this case, and of the others which we have cited, it must be seen that the question of actual physical possession cuts no figure whatever, but that the broad and equitable doctrine is, that the interest of the insolvent corporation, the interest of the unsecured creditors and the interest of the attaching creditors must all be taken into consideration, giving due consideration to the rights of priority, and equitably protected by the court administering upon the estate; and that it is not the policy of the law, and that no good reasons can be given for the division of this settlement into the hands of different tribunals or officers; and in the case at bar all the interest that the petitioners can have is the interest in the *fund* which is to be obtained from the sale of the property upon which they have a lien, and that the procedure or manner of obtaining that fund and of applying it can be safely entrusted to the discretion of the court.

The writ should be denied.

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[No. 1217. Decided February 7, 1894.]

JAMES M. COLEMAN AND AGNES H. COLEMAN, *Appellants*, v. THE COLUMBIA AND PUGET SOUND RAILROAD COMPANY *et al.*, *Respondents*.

8	227
12	649
8	227
30	201

EMERGENCY RESTRAINING ORDER—EXTENSION PENDING APPEAL
—ESTOPPEL.

A restraining order issued without notice to defendants, on the ground of a temporary emergency, cannot be kept in force by plaintiff pending an appeal.

The fact that defendants have respected such an emergency restraining order for a considerable length of time, and have made no motion against it until appeal from the judgment in the action in which it was granted, does not estop them from denying that they have treated it as a temporary injunction.

Appeal from Superior Court, King County.

Greene & Turner, for appellants.

Andrew F. Burleigh, for respondents.

The opinion of the court was delivered by

DUNBAR, C. J.—This is a motion by respondents to strike from the files a certain order of the superior court of King county, made on the 17th day of January, 1894, on motion of appellants, fixing the amount of a bond to be given by appellants to keep in force, pending an appeal to this court, a certain order claimed by appellants to be a temporary injunction made on the 15th day of October, 1889, and to strike from the files a certain bond filed in this action in pursuance of such order on the 17th day of January, 1894. The order restraining respondents was made in October, 1889; the case was not tried until December, 1893, when the court decided the issues in favor of the defendants, respondents herein, and judgment was rendered in accordance therewith. From this judgment

the plaintiffs appealed and the court made the order complained of in this motion; so that the only question is: Will the restraining order remain in force during the appeal?

The contention of the respondents is, that the restraining order, being without notice to defendants, was in its nature and effect an emergency restraining order; that the plaintiffs and appellants never applied for or obtained a temporary injunction in this action, nor served the defendants and respondents with notice of their intention to apply for one, and that no temporary injunction was ever ordered or allowed in this action. The affidavit on which the restraining order was based alleges that "if said defendants or any of them are informed by service of summons or otherwise that the plaintiff was about to apply for an injunction, that they would go upon said premises, and take possession thereof wrongfully and without right and to the great damage of the plaintiff," etc.; and the order was made without notice to the defendants.

This question was before this court in *State, ex rel. Miller, v. Lichtenberg, Judge of the Superior Court of King County*, 4 Wash. 407 (30 Pac. 716), and there we held, that "where, on the ground of emergency, a restraining order has been granted without notice to the adverse party, and an order made requiring the adverse party to show cause on a day certain why a temporary injunction should not be granted, but before hearing upon the application for the temporary injunction the court dismisses the cause, such restraining order cannot be kept in force pending appeal from the judgment of dismissal."

The questions involved here, it seems to us, fall squarely under that decision. In that case the statutes were construed at some length and with considerable care, and the conclusion reached that the court had no authority in the absence of notice to do more than to grant an order which

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would remain in force only long enough to enable the required notice to be given. The language of the opinion was:

“And should the court, without notice, grant an order for a longer time, its action in so doing would be irregular. So soon as notice can be given and an opportunity had for the party to present his application for an injunction, aided by such notice, the restraining order granted without such notice has served its purpose, and should, if necessary, be set aside by the court. It may well be held, however, that no action of the court in that regard is required, as such order would expire by its own force as soon as the parties were before the court upon notice of the application for an injunction. The only purpose of such restraining order is to keep things *in statu quo* until the matter can be brought regularly before the court. And whether such order terminates by its own force or is terminated by order of the court, the clear intent of the legislature appears in said section to protect the rights of a party from other than a temporary interference without first giving him an opportunity to be heard. The court gets no jurisdiction in the matter for the purpose of interfering with the rights of either party until the giving of notice as required by statute.”

We are satisfied with the decision of the court in that case, and it seems to us that it is decisive of the case at bar. It is contended by the appellants that, inasmuch as the respondents have for so long a time respected the restraining order and have not moved against it, they have treated it as a temporary injunction and should now be estopped from objecting to its power. But we do not think that any additional force could be given to it by any such negative compliance by the respondents, or that they should now be refused relief because they have not sooner asked for it, or because they have not taken the responsibility of disregarding it.

The appellants invoke the maxim, “Where there is a right there is a remedy;” but it must be borne in mind

that at the common law the appellants were not entitled to a stay at all, and all the remedy that they can now claim is such remedy as is especially conferred by statute; and, as under our construction of the statute the right to continue this restraint has not been given, they have nothing to complain of.

The motion will, therefore, be granted, and the order and bond complained of will be stricken from the files.

SCOTT, HOYT, STILES and ANDERS, JJ., concur.

[No. 1152. Decided February 9, 1894.]

THE STATE OF WASHINGTON, *Appellant*, v. WILLIAM K. WHITE, *Respondent*.

CRIMINAL LAW—APPEAL BY STATE—CERTIORARI TO JUSTICE OF PEACE—RIGHT OF ACCUSED TO COPY OF COMPLAINT—JUDGMENT—COSTS.

Where, in a criminal case, the defendant, after having been found guilty before a justice of the peace, has had the cause removed by certiorari to the superior court, which reversed the judgment of the justice of the peace, an appeal will lie on the part of the state to the supreme court, under the provisions of § 1, subd. 7, Laws of 1893, p. 120.

Certiorari will lie, under Code Proc., § 1621, for the removal of criminal actions from a justice of the peace to a superior court.

A justice of the peace is not required, under art 1, § 22 of the constitution, to prepare a copy of the complaint in a criminal action and deliver it to the accused, but the constitutional mandate is sufficiently complied with when the accused is given the complaint and told to make a copy of it if he chooses to. (DUNBAR, C. J., and STILES, J., dissent.)

The judgment rendered by a justice of the peace is not void for want of signing, when his docket shows that all the proceedings were entered consecutively under the title of the cause and that the justice signed the docket at the conclusion thereof.

Where the only error committed by a justice of the peace in the trial of a criminal action was in taxing the costs under the provis-

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ions of a law which had been repealed, the superior court should, in reviewing said action in certiorari proceedings, retax the costs and affirm the judgment.

Appeal from Superior Court, Stevens County.

L. B. Reeder, Prosecuting Attorney, *W. J. Galbraith*, and *James A. Haight*, for The State.

Slater & Mantz, and *Thomas C. Griffiths*, for respondent.

The opinion of the court was delivered by

SCOTT, J.—The defendant was arrested upon a charge of assault and battery, and brought before one G. M. Welty, a justice of the peace of Stevens county. Upon an application for a change of venue, the cause was transferred to one I. I. Hughes, a justice of the peace for the same county, before whom a trial was had, and defendant was found guilty, and fined one dollar and costs of suit. The defendant removed said cause, by writ of certiorari, to the superior court of said county, and a judgment was there rendered reversing the judgment of the justice of the peace aforesaid, and ordering “that the defendant be released from the penalty thereof.” From this judgment of the superior court the state has appealed.

The defendant urges that no appeal could be taken by the state, for the reason that it does not come within any of the provisions of the statute (Laws 1893, p. 120, § 1, subd. 7) authorizing an appeal by the state in criminal actions; and on the further ground that the defendant has been acquitted on a trial upon the merits, and that a reversal of the judgment of the superior court would be putting him twice in jeopardy.

We do not think the judgment rendered in the superior court can be considered as an acquittal of the defendant upon the merits, within the meaning of the section aforesaid; nor would a reversal thereof have the effect of put-

ting the defendant twice in jeopardy. Such an appeal does not involve a re-trial of the original issue.

It is contended by the state that certiorari will not lie to remove a criminal action from a justice of the peace to a superior court, but we are of the opinion that this objection is not well taken. The statute in question, § 1621, Code Proc., giving a remedy by certiorari, does not attempt or purport to limit the proceedings to civil actions, nor is there any apparent reason or ground why the same should be so limited.

It is further contended by the state that if the writ would lie there was no error in the proceedings before the justices of the peace aforesaid sufficient to warrant a reversal of the judgment in the superior court. To determine this it will be necessary to examine the points which were raised by the defendant in the superior court in the certiorari proceeding. It is contended by the defendant that these proceedings were erroneous upon several grounds, one of which is that he was refused a copy of the complaint upon which he was tried. It appears that when defendant was first brought before Justice Welty he demanded a copy of the complaint, but that the same was refused, and that upon the trial before Justice Hughes, after a jury had been impaneled, he again demanded a copy of the complaint, whereupon the justice handed him the original complaint, with the remark that he could make a copy if he chose to. No objection was made to this by the defendant, and as far as the record shows, he acquiesced therein. He contends, however, that under § 22, art. 1 of the constitution he would be entitled to a copy, and to have the same prepared for him by the court, or under its direction.

There is no act of the legislature requiring justices to furnish a copy. The only legislative provision is with reference to the furnishing of a copy by clerks of the supe-

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rior courts, and that provides a copy shall be furnished the defendant, or that he shall be given an opportunity to make one. Sec. 1223, Code Proc. The legislature has thus deemed an opportunity to take a copy a sufficient compliance with this constitutional provision, and there is no substantial reason for holding that it is not. The constitution does not in terms require the court to make the copy, or cause one to be made, and delivered to the defendant, but says substantially that the defendant shall have a right to a copy. No point is made in respondent's brief over the fact that he was refused a copy of the complaint by Justice Welty.

It is further contended that the judgment of the justice of the peace is void, on the ground that it was not signed, and that the transcript does not show when such alleged judgment was entered. A transcript of the justice's docket, showing the proceedings had in the cause, appears in the record. It shows that the verdict was rendered March 30, 1893, and that a judgment was rendered thereon for the amount thereof on the same day, and it shows that the cause was then adjourned at the request of the defendant to March 31st, and again at his request until April 3d, at which time he served the writ of certiorari. These proceedings were entered by the justice in his docket consecutively under the title of the cause, as is the custom in courts of justices of the peace, and at the conclusion thereof he signed the docket, and this is all that is required.

It appears that the costs were taxed by the justice of the peace under the provisions of § 2086 of the 1881 Code, which had been repealed by the act of March 9th (Laws 1893, p. 143), and which reduced the costs in such cases very materially. We do not think the record discloses any material error aside from this in the proceedings in

the justice's court. Consequently the judgment rendered by the superior court is reversed, and the cause remanded, with instructions to set aside its judgment of reversal, and to affirm the judgment rendered in the justice's court, with the exception that the costs shall be re-taxed by the superior court under the law aforesaid in force at the time of the trial, and that the costs of this appeal be included in such judgment, and judgment rendered for the whole thereof. It is further considered that the judgment so rendered be enforced in the superior court, if not paid or stayed by the defendant, by a levy upon his property, or by proceeding upon the bond filed by him in removing said cause by the certiorari proceeding aforesaid, or by again apprehending the defendant, and enforcing the same by imprisonment, as provided by law.

HOYT, J., concurs.

ANDERS, J., concurs in the result.

DUNBAR, C. J. (*dissenting*).—I am unable to agree with the majority in their construction of § 22, art. 1 of the constitution. The section is as follows:

“In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.”

It seems to me that under that section it becomes the imperative duty of the court to furnish the defendant a

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copy of the information when it is demanded, and that it is not enough to give him access to the record with permission to copy. It is a copy, and not the record, that is guaranteed to him by the constitution. He is entitled to a copy to take with him for careful inspection of himself or counsel. He may not be able to copy the indictment himself, and the constitution expressly says that he shall not be compelled to advance money or fees to secure this right. It might as well be said that he should be compelled to serve the process for the attendance of witnesses if the subpoenas or warrants were placed in his hands. It seems to me that the constitution could not in more explicit language have provided for furnishing him a copy, and I never will consent to a court's depriving a defendant of this plain constitutional right by an assumption that some other right is equivalent to the right guaranteed by the constitution, which is the only theory upon which the action of the court in this case can be maintained. There is nothing in the record, in my judgment, to show any acquiescence on the part of the defendant. He made a demand which was refused, and there was nothing left him but to remain silent. As I think he was entitled to a writ of certiorari, the judgment should be affirmed.

STILES, J., concurs.

[No. 1118. Decided February 12, 1894.]

EUREKA SANDSTONE COMPANY, *Appellant*, v. PIERCE COUNTY, *Garnishee*, AND JOHN T. LONG *et al.*, *Respondents*.

GARNISHMENT—LIABILITY OF COUNTY.

A county cannot be garnished when it is not liable to an action on the part of the principal defendant, for the reason that his claim against the county has not been presented to the county commissioners and rejected in whole or in part by them.

Appeal from Superior Court, Pierce County.

Arthur N. Jordan, for appellant:

Whoever may be sued may be garnished. 1 Dill., Mun. Corp. (3d ed.), § 101; 2 Wade, Attachment, § 345; Drake, Attachment, § 516; *Adams v. Tyler*, 121 Mass. 380; *Bray v. Wallingford*, 20 Conn. 416; *City of Newark v. Funk*, 15 Ohio St. 462; *Mayor v. Horton*, 38 N. J. Law, 88; *Wales v. Muscatine*, 4 Iowa, 302; *Rodman v. Musselman*, 12 Bush, 354; *Waterbury v. Commissioners*, 26 Pac. 1002.

Snell & Bedford, and *Crowley & Sullivan*, for respondents:

On the point of the exemption of municipal corporations from garnishment, counsel cited *Merwin v. Chicago*, 45 Ill. 133; *Dotterer v. Bowe*, 11 S. E. 896; *Born v. Williams*, 7 S. E. 868; *Switzer v. Wellington*, 19 Pac. 620; *Buchanan v. Alexander*, 4 How. 20; *Erie v. Knapp*, 29 Pa. St. 173; *McDougal v. Supervisors*, 4 Minn. 184; *Mayor v. Rowland*, 26 Ala. 498; *Mayor v. Root*, 63 Am. Dec. 692; *Memphis v. Laski*, 24 Am. Rep. 327; *Burnham v. Fond du Lac*, 15 Wis. 211; *Sheppard v. County of Cape Girardeau*, 1 S. W. 305; Drake, Attachment (7th ed.), § 516 and notes.

The opinion of the court was delivered by

HOYT, J.—Plaintiff brought this action against J. T. Long and others to recover for goods sold and delivered,

and instituted proceedings by way of garnishment against the county of Pierce. The county appeared and asked to be dismissed without answer, on the ground that it could not be held liable as a garnishee defendant. Its application was granted, and from the order dismissing it without answer this appeal is prosecuted.

The briefs of the respective parties have gone extensively into the question of the liability of a county in this state as garnishee in a suit against the principal defendant. We do not find it necessary to discuss many of the questions presented by the briefs. There is much force in the position of the respondents that public policy will not allow the business of a county to be interrupted by proceedings of this kind; but we do not need to say anything in regard to that question. Under the statute law of this state (Laws 1893, p. 291), a county can only be sued upon a contract liability after the rejection in whole or in part by the board of county commissioners of a claim against the county growing out of such liability; and the general provision in the statutes (Gen. Stat., §§ 2437, 2438), relied upon by appellant, that counties are bodies corporate and may sue or be sued, must be interpreted in the light of other provisions of the statute, pointing out the manner in which it may be sued. This would probably be so if such section contained no express reference to other provisions of the statute, and when the right to sue is expressly limited to "the manner prescribed by law," it is made clear that such section must be construed in the light of other statutory provisions. It must follow that the principal defendant could not, under the circumstances disclosed by this record, maintain an action against the county. If he cannot do so, the plaintiff cannot, as the general rule is that garnishment will only lie when an action could be maintained by the principal defendant.

We have been unable to discover anything in the stat-

ute relating to garnishment that in any way tends to change the rule as to suits being instituted against a county; and as the same principle of public policy would require that counties should be excused from responding in garnishee proceedings as in suits by principal defendants, there is nothing to show why the general rule above referred to should not have force.

What we have said has been upon the supposition that the statute as to garnishment was broad enough to make it applicable to counties; but as to whether or not this is so is a question of grave doubt. But the other reasons which we have suggested being sufficient to sustain the action of the court below, it is not necessary for us to say anything in regard thereto.

The order appealed from must be affirmed.

STILES and SCOTT, JJ., concur.

DUNBAR, C. J., and ANDERS, J., dissent.

[No. 1127. Decided February 12, 1894.]

J. C. RATHBUN, *Appellant*, v. THURSTON COUNTY, *Respondent*.

ACTION ON CONTRACT FOR COUNTY PRINTING — PLEADING — EVIDENCE — INTEREST OF JURORS.

In an action to recover for services in doing the county printing, a complaint is demurrable for want of facts, when it does not allege that the work was done by plaintiff or that he had any interest in the newspaper in which the official notices were published.

In such an action, the answer states facts sufficient to constitute a defense when it alleges that plaintiff sold his paper in which he had contracted to do county printing, and had refused and neglected to carry out and perform his contract, by reason of which defendant was compelled to enter into a contract with another to do the printing for said county, for the unexpired time covered by

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the contract with plaintiff, and that the printing for which plaintiff now sought to recover had been done by another under such subsequent contract.

In such an action, the plaintiff should be non-suited, when the evidence shows that he had sold the paper in which he contracted to do the county printing to another, and that the county commissioners refused to furnish him with any more notices for publication.

The interest of jurors as taxpayers of a county in an action against the county will not disqualify them from serving as a jury to try the cause.

Appeal from Superior Court, Thurston County.

Phil. Skillman, and J. C. Rathbun, for appellant.

Milo A. Root, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—This is an action brought by the appellant to recover pay for services alleged to have been rendered under a contract made with the county of Thurston, for the publication of certain notices between the first day of July, 1890, and the first day of July, 1891. The amount claimed to be due is the sum of \$3,659.60.

The respondent admits entering into the contract with appellant, but denies that the appellant performed the services alleged, and alleges that upon the failure and refusal of appellant to carry out said contract, it entered into another contract with one B. M. Price, and the work was so done by Price and not by the appellant. The case was tried in the superior court, resulting in a verdict for the respondent. Judgment was entered, and from such judgment the appeal is taken to this court.

The contract was to do the work of the county from July 1, 1890, to July 1, 1891; and the notices were to be published in the newspaper named the "*Olympia Review*," a weekly newspaper published at Olympia, of which appellant was the publisher. After the execution of the con-

ute relating to garnishment that in any way tends to change the rule as to suits being instituted against a county; and as the same principle of public policy would require that counties should be excused from responding in garnishee proceedings as in suits by principal defendants, there is nothing to show why the general rule above referred to should not have force.

What we have said has been upon the supposition that the statute as to garnishment was broad enough to make it applicable to counties; but as to whether or not this is so is a question of grave doubt. But the other reasons which we have suggested being sufficient to sustain the action of the court below, it is not necessary for us to say anything in regard thereto.

The order appealed from must be affirmed.

STILES and SCOTT, JJ., concur.

DUNBAR, C. J., and ANDERS, J., dissent.

[No. 1127. Decided February 12, 1894.]

J. C. RATHBUN, *Appellant*, v. THURSTON COUNTY, *Respondent*.

ACTION ON CONTRACT FOR COUNTY PRINTING—PLEADING—EVIDENCE—INTEREST OF JURORS.

In an action to recover for services in doing the county printing, a complaint is demurrable for want of facts, when it does not allege that the work was done by plaintiff or that he had any interest in the newspaper in which the official notices were published.

In such an action, the answer states facts sufficient to constitute a defense when it alleges that plaintiff sold his paper in which he had contracted to do county printing, and had refused and neglected to carry out and perform his contract, by reason of which defendant was compelled to enter into a contract with another to do the printing for said county, for the unexpired time covered by

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the contract with plaintiff, and that the printing for which plaintiff now sought to recover had been done by another under such subsequent contract.

In such an action, the plaintiff should be non-suited, when the evidence shows that he had sold the paper in which he contracted to do the county printing to another, and that the county commissioners refused to furnish him with any more notices for publication.

The interest of jurors as taxpayers of a county in an action against the county will not disqualify them from serving as a jury to try the cause.

Appeal from Superior Court, Thurston County.

Phil. Skillman, and J. C. Rathbun, for appellant.

Milo A. Root, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—This is an action brought by the appellant to recover pay for services alleged to have been rendered under a contract made with the county of Thurston, for the publication of certain notices between the first day of July, 1890, and the first day of July, 1891. The amount claimed to be due is the sum of \$3,659.60.

The respondent admits entering into the contract with appellant, but denies that the appellant performed the services alleged, and alleges that upon the failure and refusal of appellant to carry out said contract, it entered into another contract with one B. M. Price, and the work was so done by Price and not by the appellant. The case was tried in the superior court, resulting in a verdict for the respondent. Judgment was entered, and from such judgment the appeal is taken to this court.

The contract was to do the work of the county from July 1, 1890, to July 1, 1891; and the notices were to be published in the newspaper named the "*Olympia Review*," a weekly newspaper published at Olympia, of which appellant was the publisher. After the execution of the con-

tract, but before the publication of the notices which were involved in this action, the appellant sold the *Review* to one B. M. Price, and its name was changed to the "*Weekly Capital*." The publications of the notices involved were thereafter made in the *Weekly Capital*, under a contract made by the county with Price, the publisher of the *Capital*. The claim of the appellant is, that when he sold the *Review*, he made arrangements with Price to continue the county printing; that the work was thereafter done by Price as his agent, and that he is, therefore, entitled to pay for the same.

The first assignment of error by appellant is the sustaining of respondent's demurrer to appellant's original complaint. We think the demurrer was properly sustained. All the allegation of services in the complaint was as follows:

"That the advertising and official publication of all notices of the defendant from April 11, 1891, to July 1, 1891, were published in the said *Weekly Capital* with the consent of defendant and by its directions."

There is no allegation whatever that such work was done by the plaintiff, or that he had any interest whatever in the *Weekly Capital*, and no presumption that such was the case can be indulged in. If it could be, the defense which the county has made to this complaint could not be entertained; for the very essence of the defense is that such publications made in the *Capital* were not made under the contract with the appellant.

An amended complaint was filed, to which an answer was interposed, alleging that prior to the 11th day of April, 1891, plaintiff had sold the paper referred to in his complaint as the *Weekly Capital* to one B. M. Price, and had failed, refused and neglected to carry out and perform his contract; and that by reason of said neglect, failure and refusal on the part of the plaintiff, the defendant was

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compelled to and did enter into a contract with B. M. Price as the publisher of the *Capital*, to do the printing for said county between the 11th day of April, 1891, and the 1st day of July 1891, and that all printing done for said county was done under contract with said B. M. Price and not under any contract with this plaintiff. Whereupon plaintiff moved to strike from the answer the allegation of the sale of the paper to Price and the contract entered into by the county with Price, and all that portion of the answer concerning its transaction with Price, which motion was overruled by the court.

It is urged by the appellant that one party to a contract cannot escape his liability by making a new contract covering the same work with the agent or servant of the other party, and that it is not proper to offer such contract in evidence when defending an action brought on the first contract. There is no doubt of the correctness of this proposition, and had this action been brought against the county for breach of contract, the answer objected to and the proof offered thereunder would have been irrelevant, and it would plainly have devolved upon the county to have proven that plaintiff had abandoned his contract. In that event it would have made no difference whether they had entered into any subsequent contracts or not; for they would have been relieved of the payment of this claim by reason of such abandonment. But plaintiff does not sue the county in this action for the violation of any contract, but for services rendered under the contract, and the allegations objected to are relied upon by the county to show that some one else, and not the plaintiff, performed the services, which we think, in this character of action, was perfectly admissible, because, if proven, they would certainly be a perfect defense to the complaint.

We think the instructions given by the court were substantially correct, and that if there was any error at all

committed by the court in such instructions, such errors were in favor of appellant.

This brings the case to the question of the sufficiency of the evidence. It is urged by the appellant that the jury being taxpayers, and this action being an action against the county, the jury are, to a limited extent, interested. This is an interest that is not taken into consideration by the law. They are qualified jurors in such cases and their verdict must receive the same consideration at the hands of this court as the verdict of a jury in any other case. Even if we should have a different view of the weight of the testimony from that reached by the jury, we would not feel justified in disturbing it. But an examination of the record in this case leads us to the conclusion that the verdict was sustained by the clear weight of testimony. We are of the opinion that the testimony of the plaintiff alone justified the request of the respondent for a non-suit.

We do not think that under the statute the county can be placed in the position which the testimony of the appellant shows that he sought to place the county in this case. Conceding for the purposes of the case, which we are not now prepared to say we would concede if the question was properly before us, that the county would be bound by its contract where the paper with which it had contracted had been sold to another publisher and its name changed, it is asking too much of the county to have its notices placed on wheels to be run around to different papers in the county, the standing of which was not taken into consideration by the county when it entered into the contract, and to be drawn into the inconvenience of, and made a party to, any such controversy as the testimony of the appellant shows existed between him and Price, the publisher of the *Capital*.

But outside of this question, we say the testimony of the appellant shows, not only that he had deprived himself of

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the power of complying with the contract, but that the commissioners actually refused to allow him to do the work; for he testified as follows:

“The work was done by the *Standard* for a short time, when the commissioners or the auditor’s office refused to give me any more work at all. They paid the bill, however, for the work I had done at the *Standard*.”

If this is true, that the commissioners refused to give him work, then, even presuming that he had not rendered himself incompetent to do the work, there was a plain violation of the contract by the commissioners, and his remedy was a suit for damages for violation of the contract, and not for services performed which evidently were not performed by him, if the commissioners refused to give him the work to do.

The auditor, Tweed, testifies that Rathbun made a formal demand that the printing be delivered to him and that it should not be sent to the *Capital*; but that he, the auditor, insisted that it should go to the *Capital*. He also testifies positively that the work was done under the new contract with Mr. Price. Garfield, the deputy auditor, testifies that the appellant demanded of him that he should not take the county printing to the *Weekly Capital* for publication; that it should go to him for publication, that it should not be taken to the *Capital*. That he afterwards had a conversation with the appellant, and the appellant informed him that he was the contractor for the county printing, and that it should be taken to the office of the *Weekly Standard* for publication; and when asked by what authority he took the notices to Mr. Price, his answer was: “By authority of the contract which existed between the county and Mr. Price, and by the direction of the executive in the office.”

It seems very plain to us from the testimony that, whatever rights the appellant may have against the county for violation of contract, where the measure of damages would

be altogether different, there is no testimony here to support his claim for services rendered. In fact, he testifies himself that he was present when they were awarding further contracts for this same work, and entered a protest against the action of the commissioners in that respect.

We think the judgment must be affirmed.

ANDERS, HOYT, STILES and SCOTT, JJ., concur.

[No. 1155. Decided February 12, 1894.]

DAVID WALLACE, *Appellant*, v. IRA A. TOWN AND W. W. LIKENS, *Respondents*.

WEIGHT OF TESTIMONY—ACTION BETWEEN ATTORNEY AND CLIENT.

Where the evidence is conflicting as to whether a deed given by plaintiff for attorney fees, although absolute on its face, was intended as security merely for their payment, a judgment in favor of defendants should not be set aside on the ground of the fiduciary relation of the parties, as such case simply involves the credibility of witnesses, and not the fairness of the transaction.

Appeal from Superior Court, Pierce County.

M. L. Clifford, for appellant.

Town & Likens, for respondents.

The opinion of the court was delivered by

DUNBAR, C. J.—Respondents, a law firm, were employed by the appellant to transact certain legal business involving a five acre tract of land owned by appellant near the city of Tacoma. Appellant executed to respondents a warranty deed for one-eighth of this tract of land. The claim of appellant is, that this deed was intended as a mortgage to secure respondents' attorneys' fees; while the re-

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spondents claim that it was an actual payment of their attorneys' fees agreed upon. So that the question to be determined is, was the deed mentioned intended to be an absolute deed as expressed on its face, or was it intended to be a mortgage for the security of a reasonable attorneys' fee.

This is a case of pure conflict of testimony. This court has often said, where the jury, or when tried by the court, the court, had weighed the testimony, this court would not disturb such findings when there was sufficient testimony to sustain the same. It is urged by the appellant that the testimony in this case, where the relation of attorney and client is shown to exist, must be weighed by a different scale from that employed in weighing testimony generally. While it is true that where this relationship exists courts will closely inspect the testimony and the whole transaction between the attorney and client, yet it seems to us that, under the circumstances of this particular case, this deed cannot be construed with reference to any particular relationship, but that it becomes a case involving simply the credibility of witnesses.

The appellant swears that the deed was intended as a mortgage, and that no specific amount of attorney's fees was agreed upon. This testimony is flatly contradicted by respondent Likens, who swears positively that there was no talk or understanding about any security, but that after considerable discussion as to what their attorneys' fees should be it was positively understood and agreed that they were to have a deed and absolute title to one-eighth of the land for their fees. In answer to the question, if it was not understood that they were to hold the land until the attorney's fees were paid, the witness testified:

"No, sir; I understood and he understood that we were to have absolute title to one-eighth of that land for our fees. There was no understanding nor nothing said about any

other arrangement. We were to have the absolute, unqualified ownership.

“Q. Did you tell him the effect of making that deed to you? A. He knew it was a deed and that we were going to record it.

“Q. Did you tell him as to the effect of that deed; that it meant an absolute deed of one-eighth of all of that property at the time the deed was executed? A. The agreement was that we were to have a warranty deed for an undivided one-eighth of the property, and that warranty deed was executed according to that agreement.”

It seems to us that this becomes simply a question of veracity, and that one or the other of these witnesses was not telling the truth, and that if the court believed the testimony of respondent it could not believe the testimony of appellant, and that no relation of attorney and client, or any other relation, could affect the credibility of the witnesses so far as the weight of testimony was concerned. Nothing in this case showed that by reason of the relationship of attorney and client any advantage was taken of the want of technical understanding on the part of the appellant. It was a plain proposition, which any man of ordinary understanding outside of the legal profession could comprehend. The record shows that the appellant was a man having had some experience with deeds and mortgages, and he evidently knew the difference between a deed and a mortgage. If his testimony is true, the fact is that the instrument was intended as a mortgage to secure the attorneys' fees. If the testimony of the respondent is true, the fact is that the instrument was intended as an absolute deed or payment of the attorneys' fees; and as we have before said, it is simply a question of which witness was telling the truth. The court who heard the testimony believed the testimony of respondent, and we think that, from all the circumstances of the case, he was justified in so believing.

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We recognize the force of the authorities cited by the learned attorney for the appellant, to the effect that when the relation of attorney and client is shown, it devolves upon the attorney to show the entire fairness of the transaction, and that the reasonable value of the services was equal to the value of the land deeded. But these cases are not in point here. This question of the unequal value of the services and the land was not raised by the pleadings. It is nowhere claimed in the complaint that the services were not commensurate with the value of the land; but appellant alleges that he has been put to great expense and cost by reason of the misconduct of the defendants while employed by him as his attorneys, and that the amount of such expense and costs is far greater than the reasonable value of all services rendered by said defendants as his attorneys. While it does not appear to us that this allegation is borne out in any manner by the testimony, yet any act of negligence on the part of the attorneys subsequent to the making of the deed could not be taken into consideration in determining the intention of the parties at the time of the execution of the deed.

We think, under all the circumstances of the case, that *the finding* of the court below was justified by the testimony, and the judgment will, therefore, be affirmed.

ANDERS, HOYT, STILES and SCOTT, JJ., concur.

[No. 1231. Decided February 12, 1894.]

EDWARD O. GRAVES, *Appellant*, v. THE CITY OF SEATTLE
et al., *Respondents*.

ELECTIONS AND VOTERS—REGISTRATION—CONSTRUCTION OF STATUTE—LEGISLATIVE INTERPRETATION.

Registration is not a necessary qualification of voters at a special election held under the provisions of the act of March 3, 1893, for the purpose of validating warrants and other evidences of indebtedness of cities and towns in certain cases.

The opinion of the legislature as to the construction of a law can have no force, unless such opinion is enacted into a law.

Appeal from Superior Court, King County.

Bausman, Kelleher & Emory, for appellant.

George Donworth, and *James B. Howe*, for respondent:

In order to deprive unregistered electors of the right to vote at special elections the law must clearly so provide. *Stevens v. Mayor*, 11 S. E. 150; *Mayor v. Wade*, 16 S. E. 21; *Kaigler v. Roberts*, 15 S. E. 542.

The opinion of a subsequent legislature upon the meaning of a statute is entitled to no more weight than that of the same men in a private capacity. *Bingham v. Board*, 8 Minn. 441; Bishop, Statutory Crimes, § 76; Endlich, Interpretation of Statutes, § 372, and authorities cited; *Goodrich v. Russell*, 42 N. Y. 177; *Ingalls v. Cole*, 47 Me. 530. A recital in an act of parliament of what the law is does not bind the courts. *Jones v. Mersey Docks*, 11 H. L. Cas. 518.

The opinion of the court was delivered by

HOYT, J.—By this proceeding appellant sought to prevent the issuing by the city of Seattle of certain bonds, which had been authorized by an election in said city held

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Opinion of the Court—HOTT, J.

under the provisions of the act of March 3, 1893 (Laws, p. 56), on the ground that the requirements of the statute had been so far departed from in the conduct of such election as to render it of no force.

It is conceded that all of the forms of law were complied with in the holding of such election, except that there was no registration of voters, and that the provisions of the law relating to registration and the furnishing of poll books, etc., had not been complied with. That there were no such formalities is conceded by the respondents. They contend, however, that without them the election was valid. Hence the question presented for determination is, as to whether or not registration was a part of the qualifications of a voter at such election.

That the general registration law does not apply to elections of this kind was held by this court in the case of *Seymour v. Tacoma*, 6 Wash. 138 (32 Pac. 1077), and that decision is decisive of this case, unless by force of the statute under which the election was held registration was required at such election. We have carefully examined the statute and are unable to find that anything has been enacted therein requiring registration. There are expressions contained in the act which clearly show that at the time of its enactment the legislature was of the opinion that the general registration law applied to elections of this kind, but such opinion is in no manner enacted into a law making such general registration law apply to such elections.

It is a familiar rule of statutory construction that the opinion of a legislative body as to the construction of a law can have no force unless it is given force by being enacted into a law. That the legislature has, by way of recitals or otherwise, shown that it thought a certain law already upon the statute books would receive a certain interpretation, cannot influence the courts in construing such statute.

It is the duty of the legislature to enact laws, not to interpret them; and while it is competent for it by enactment to require a law to be construed in a certain way, it is because of the fact of such enactment that it is binding upon the courts, and not by reason of the opinion of the legislature that as it stood, without such enactment, it was capable of such construction.

For these reasons we must hold that there is nothing in the laws enacted subsequently to the decision above referred to which changes the rule therein announced; and as, in our opinion, this question comes within the reason, if not the express holding, of our former decision, the ruling of the superior court that such election was valid without registration, and its judgment rendered thereon must be affirmed.

DUNBAR, C. J., and STILES, ANDERS and SCOTT, JJ.,
concur.

[No. 1148. Decided February 13, 1894.]

CHARLES REICHENBACH, *Respondent*, v. FRANK SAGE *et al.*,
Appellants.

APPEAL — DISMISSAL — FAILURE TO ENTER JUDGMENT.

Where the judgment in an action prepared by the court has been lost and never entered, an affidavit of one of the attorneys describing the judgment set forth in the transcript on appeal does not constitute such record of a judgment as will warrant the reversal of the original judgment.

Appeal from Superior Court, Pierce County.

Town & Dillon, for appellants.

Taylor & McKay, for respondent.

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Syllabus.

The opinion of the court was delivered by

DUNBAR, C. J.—Respondent moves to dismiss the appeal herein, for the reasons: (1) That the appeal was not taken or perfected within the time required by law. (2) The notice of appeal does not refer to any judgment or describe any judgment in this case. (3) That the notice of appeal was not served or given as required by law.

It appears from the record in this case that the judgment which was prepared by the court was lost, was never found and never was entered; so that there is no judgment of record from which an appeal can be taken. There is set forth in the record an affidavit of E. W. Taylor, who was attorney for respondent below, which attempts to describe the judgment; but this does not constitute such record of a judgment as would warrant the reversal of the original judgment by this court. The court not being, then, properly informed what the judgment is that is appealed from, it is impossible for us to review it.

The appeal is, therefore, dismissed.

ANDERS, STILES and SCOTT, JJ., concur.

HOYT, J., concurs in the result.

[No. 1115. Decided February 14, 1894.]

THE CITY OF ABERDEEN, *Respondent*, v. ALBERT A. HONEY *et al.*, *Appellants*.

ACTION ON BOND—LIABILITY OF OBLIGORS—PENALTY—POWER OF CITY TO TAKE BOND FOR LIQUIDATED DAMAGES.

Where a bond is given by individuals to a city, conditioned that a certain corporation will construct and complete a street railway within a given time, according to the provisions of an ordinance of the city granting said corporation a franchise for the purpose, the obligors are not liable for the failure of the corporation to comply

with the terms of the franchise, as such bond on their part is without consideration.

Where a bond is given in a penal sum, conditioned that the construction of a certain street railway will be commenced and completed according to the terms of a certain franchise granted by a city, such bond is a penal one and there can be no recovery thereon when there is no proof showing that any actual damages had accrued to the city by reason of a failure to construct the railway.

It is not within the corporate powers of a city of the third class to take a bond conditioned that the obligors shall construct a street railway upon its streets, and in case of default shall pay a certain sum as liquidated damages.

Appeal from Superior Court, Chehalis County.

Wm. W. Archer, and Ben. Sheeks, for appellants.

Wm. O. McKinlay, for respondent.

The opinion of the court was delivered by

STILES, J.—The respondent, the city of Aberdeen, is a city of the third class, and brought suit to recover of the appellants the sum of \$2,500, which was the penal sum in a certain bond theretofore executed by the appellants to the respondent city, under the following circumstances:

The Pacific Wheless Electric Railway Company was, in 1891, a corporation authorized to do business in this state, and in that year made application to the respondent city for a franchise to construct and operate a street railway in said city. In compliance with the company's request, the city, by its council, passed an ordinance, which contained the following:

"SEC. 18. Said grantees shall deposit with the city clerk of Aberdeen at the time of the filing of their acceptance of this ordinance, a bond in the sum of \$2,500, gold coin of the United States of America, to be approved by the council, conditioned that they will pay said sum to the city of Aberdeen in the event that said grantees do not construct and complete said road in accordance with the terms and conditions of this ordinance."

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Opinion of the Court—STILES, J.

The grantees mentioned as named in the ordinance were the "Pacific Wheless Electric Railway Company, and their assigns." The ordinance was duly accepted by the company, and in assumed compliance with said § 18 a bond was executed, which is the bond now in suit. This bond was not executed by the Pacific Wheless Electric Railway Company, but by four individuals who are the appellants here. The bond is in the penal sum of \$2,500, and is conditioned as follows:

"The conditions of the above obligation are such that, if the above bounden obligors shall, on or before the 14th day of April, 1891, actually commence in good faith the work of constructing the street railway under and according to the provisions of that certain franchise, right or privilege heretofore granted by the said city of Aberdeen, acting by and through its mayor and common council by ordinance, duly passed and signed upon the 14th day of February, 1891, unto the Pacific Wheless Electric Railway Company, and shall well and truly construct, finish and in all things complete the said railway on or before one year from the said 14th day of April, 1891, according to the provisions of the ordinance aforesaid, then this obligation to be void, otherwise to remain in full force and effect."

Judgment in the full sum of the bond was rendered against appellants, and they now urge several reasons why the judgement should be reversed. These reasons we hold to be ample sufficient, and they are as follows:

1. The bond in question was not the bond required by the ordinance. It was not the bond of the Pacific Wheless Electric Railway Company, to which the ordinance granted the franchise.

2. There was no consideration running to the obligors in the bond for the reason that no franchise had been granted to them, and they, as individuals, would have had no right to construct any street railway under the franchise granted to the Pacific Wheless Electric Railway Company,

it not appearing that the franchise had been assigned to them.

3. The bond was a penal bond, and no proof was offered showing any actual damages which had accrued to the city by reason of the failure to construct the railroad. There was a total failure, nothing ever having been done towards its construction.

4. If the bond were considered to be one for liquidated damages, it was not within the corporate powers of the city of Aberdeen to take such a bond.

The law of its incorporation (Laws 1890, p. 184, § 117, subd. 13) authorizes it "to permit, under such restrictions as they may deem proper, the laying of railroad tracks, and the running of cars drawn by horses, steam or other power thereon." This provision did not authorize the corporation to build or operate a street railroad, and it could not therefore make a lawful contract for the building of one. Neither could it take such a bond for the purpose of making a profit out of it in case the grantee of the franchise should not proceed with the contemplated work. Its only authority to obtain revenue was, under its charter, through the medium of taxation or some kindred means, such as licenses, fines and the like. *Herzo v. San Francisco*, 33 Cal. 134.

The demurrer to the complaint should have been sustained and the cause dismissed. The judgment will be reversed, and the cause remanded with directions accordingly.

DUNBAR, C. J., and HOYT, ANDERS and SCOTT, JJ., concur.

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Opinion of the Court—ANDERS, J.

[No. 1082. Decided February 16, 1894.]

THE AMERICAN ASPHALT COMPANY, *Respondent*, v. F. M.
GRIBBLE, *Defendant*, AND MARY COFFER, *Appellant*.

APPEAL—STATEMENT OF FACTS—NOTICE OF SETTLEMENT.

Where the notice of settlement of a statement of facts designates no place at which application therefor is to be heard, as required by Code Proc., § 1422, the statement will be stricken on the ground that it was settled and certified without notice to respondent.

Appeal from Superior Court, Pierce County.

Snell & Johnston, for appellant.

Best & Munn, for respondent.

The opinion of the court was delivered by

ANDERS, J.—The notice of filing the statement of facts herein which was served on the respondent failed to designate a place at which the appellant would apply to the court or judge who tried the cause or rendered the judgment complained of, to settle and certify said statement of facts. The notice, therefore, omitted one of the positive requirements of the statute then in force (Code Proc., § 1422), and consequently was wholly ineffectual for the purpose intended; and the respondent was at liberty to disregard it entirely, which it appears he did. It follows that the statement of facts was in effect settled and certified without notice to the respondent, and hence cannot be considered by this court.

The motion of respondent to strike the statement from the record must, therefore, be granted. And as the cause is one of equitable cognizance, and the facts upon which the judgment was based not being properly in the record, the judgment must be affirmed, and it is so ordered.

DUNBAR, C. J., and STILES, SCOTT and HOYT, JJ.,
concur.

8	255
14	701
8	255
19	375

[No. 1068. Decided February 20, 1894.]

HERMAN ZELINSKY, *Respondent*, v. JAMES H. PRICE, *Appellant*.

CONTINUANCE—ABSENCE OF ATTORNEY—ACTION AGAINST SHERIFF
—FAILURE TO SERVE WRIT—EVIDENCE—EXEMPTIONS.

The refusal of the court to grant a continuance because of the absence of one of defendant's attorneys is not error, when it appears that one of his attorneys of record was present at the time the cause was called for trial, and that the cause had been regularly set for trial upon that day several days prior thereto.

There is sufficient evidence to sustain a verdict in an action against a sheriff for failure to serve a writ of attachment, when it is shown that the attachment defendant, at the time of the issuance of the writ, had property in the county subject to seizure; that plaintiff's attorney gave the deputy sheriff a list of the property within an hour after the writ had been left at the sheriff's office for service, and told him that if he would go to the plaintiff, whose residence was near that of defendant, the plaintiff would point out the property to him; that within a day thereafter said deputy again approached plaintiff's attorney and asked for his fee for serving the papers, and said that he had no trouble in finding the property, but did not say as to whether he had made any levy; and that in fact no levy was ever made.

In such an action it is not error to admit the testimony of plaintiff showing that the deputy sheriff came to him one day and that he pointed out the defendant's residence and told the deputy defendant had a number of horses, which the deputy would find by going over there; and that said deputy had some papers sticking out of his pocket, but that plaintiff could not tell whether they were the summons and writ of attachment against defendant; such testimony is admissible as tending to show information furnished the officer that the defendant had property subject to seizure upon the writ.

Although an attachment defendant may be entitled to exemption under the provisions of Code Proc., § 486, subd. 4, it is for him to make the claim, and the plaintiff has a right to have the property primarily seized upon the levy of the attachment.

Appeal from Superior Court, Pierce County.

Palmer & Palmer, and Baker & Campbell, for appellant.

Taylor & McKay, for respondent.

The opinion of the court was delivered by

SCOTT, J.—In September, 1890, the respondent commenced an action in the superior court of Pierce county against one Baker and his wife, and caused a writ of attachment to be issued therein against the property of said defendants, and placed the same in the hands of the appellant, who was then sheriff of said county, for service. Appellant failed to serve said writ, and after judgment was obtained by Zelinsky in said action, he brought this action against appellant for damages occasioned by his failure to levy said attachment in the suit aforesaid.

It is contended that the court erred in not granting the defendant a continuance of the trial which was asked on the ground of the absence of one of his attorneys. The attorneys of record for said defendant in said action were Palmer & Palmer. One of the said attorneys was present at the time the cause was called for trial, and it appears that the same had been regularly set for trial for that day upon the trial calendar some days previously. We do not find any error in the refusal of the court to grant such continuance.

Appellant further contends that the evidence was insufficient to sustain the verdict brought in against him, on the ground that it does not sufficiently appear therefrom that the defendants in said attachment suit had property in said county subject to seizure at the time said writ was issued. It appears that at the time the suit was commenced by Zelinsky against said Baker and wife, the attorney for Zelinsky in said action took the writ of attachment and the summons to the sheriff's office and left the same for service, and that about an hour after the delivery thereof one Daggett, one of the sheriff's deputies, approached said attorney and asked him where said defendants lived and where the property was that the plaintiff wanted attached; and that

thereupon said attorney gave him a writing containing a list of certain horses, harnesses, wagons and property which said defendants had, which had been furnished said attorney by said plaintiff Zelinsky; and informed said deputy where Mr. Zelinsky lived, and stated to him that the defendants lived near the same place, and told said deputy if he would go to Mr. Zelinsky he would point out to him the property to be attached; and that during that same day, or the evening of the next day, said deputy again approached said attorney and asked for his fee for serving the papers. Whereupon said attorney gave him a note to the plaintiff directing him to pay the fees. And that during this time said attorney asked said deputy what success he had, and the deputy replied that he had no trouble at all in finding the property, but did not say as to whether he had made any levy.

There was further testimony showing that at this time, and for some days thereafter, said attachment defendants owned some ten head of horses with harnesses and wagons, of the value of eleven hundred dollars or more, situated in said county. Why said writ of attachment was not served does not appear. No testimony was offered on the part of the defendants at the trial, and from the testimony introduced by the plaintiff sufficient appears to show that enough property subject to execution sale might have been seized under said writ of attachment to have satisfied the demands of the plaintiff in such action had due diligence been used by said deputy sheriff in the premises.

It is further contended that the court erred in refusing to strike out the evidence of Zelinsky in relation to the service of the summons and attachment. It appears from the testimony of this witness that said deputy sheriff came to him one day at his store and asked him where Baker lived. Whereupon said witness pointed out said Baker's residence, and told him that he had a number of horses

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over there, and directed him to go over there and he would find them; and that said deputy had some papers in his possession at that time; that he saw them sticking out of his pocket, but that he could not tell whether they were the summons and writ of attachment in question. There was no error here. The testimony was not offered for the purpose of showing the service or non-service of the papers; nor should it have been excluded on the ground that the witness could not fix the date at which the conversation occurred, which is urged by appellant in his brief, although it was not included in his motion. The testimony was admissible for what it was worth, as tending to show information furnished the officer that the defendants in said suit had property subject to seizure upon the writ.

It is further contended that the court erred in permitting said plaintiff to testify to a conversation between himself and Baker. An examination of the record, however, shows that this testimony was stricken on the defendant's motion.

It is contended that the court erred in an instruction in which he told the jury that, if they found that Baker was the owner of the horses in question at the time the sheriff had the writ of attachment, said horses were, all except two of them, subject to seizure; that two of them would be exempt and the balance of them would be liable upon the writ. It is contended that this is erroneous upon the ground that more of them might have been exempt. The testimony showed that said defendant was a teamster and as such would have been entitled to have one team exempted from sale; but if he was entitled to further exemptions by virtue of the provisions of subd. 4 of § 486, Code Proc., it was for him to make the claim, and the plaintiff had a right to have the property primarily seized upon the attachment.

Some question is raised over the sufficiency of the evi-

dence as to the payment of the sheriff's fees. It is contended that he had no right to serve the papers until his fees had been paid (§ 3009, Gen. Stat.), and that the evidence failed to show payment. But there seems to have been no controversy between the parties at the time with regard to this, and no objection to the course taken by the plaintiff's attorney in sending the officer to the plaintiff for his pay, nor is there any proof by the sheriff's return or otherwise, that the failure to serve was due to non-payment of fees.

We find no error in the record, and the judgment is affirmed.

DUNBAR, C. J., and ANDERS, HOYT and STILES, JJ.,
concur.

[No. 1109. Decided February 20, 1894.]

JOHN W. BARNETT, *Respondent*, v. J. V. O'LOUGHLIN
et al., *Appellants*.

ATTACHMENT—WRONGFUL LEVY—ACTION BY SHERIFF ON INDEMNITY BOND.

Where the sheriff has levied upon certain property as the goods of the defendant in an attachment proceeding, and, acting under an indemnity bond and by the direction of the plaintiff, has held possession of the property against the rightful claim of a third party, and has been compelled to satisfy a judgment against himself obtained by said third party by reason of such wrongful levy, the title to such property passes to the sheriff in trust for the attachment plaintiff; and the disposal of such property by the sheriff at private sale by the direction of the attachment plaintiff, does not amount to a trespass, nor prejudice his right of recovery upon the indemnity bond.

The necessary expenses incurred by the sheriff in taking care of attached property by direction of the plaintiff, pending litigation as to its actual ownership, form a proper charge against plaintiff, and may be retained from the proceeds derived from the sale of the property.

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Opinion of the Court—SCOTT, J.

Appeal from Superior Court, Lewis County.

Swasey & Lemley, for appellants.

Reynolds & Stewart, for respondent.

The opinion of the court was delivered by

SCOTT, J.—This action was commenced by the respondent against the defendants to recover on an indemnity bond given by them to him as sheriff, to indemnify him from loss by reason of the levy of a writ of attachment issued in the suit of O'Loughlin against one Hunt, and levied on certain personal property which was claimed by one Dixon. After said seizure Dixon demanded said property of the sheriff, and O'Loughlin refused to allow the surrender of it, whereupon Dixon brought suit against the sheriff to recover its value. After this suit was commenced, O'Loughlin, as principal, with the other defendants as sureties, executed the indemnity bond to the sheriff. Such proceedings were had in the suit brought by Dixon against the sheriff that a judgment was rendered in his favor against said sheriff, amounting to nearly \$2,000. O'Loughlin and the sureties in said indemnity bond having failed to satisfy the judgment so recovered against the sheriff, he brought this action on the bond. O'Loughlin recovered judgment in his suit against Hunt, and execution was issued thereon, and the property attached was sold, excepting that which was claimed by Dixon. The sheriff was directed not to sell that property in consequence of the litigation, as it was uncertain and undetermined at that time whether the property belonged to Hunt or to Dixon. After Dixon recovered judgment against the sheriff said sheriff sold the property which he had seized as aforesaid, and which was in controversy in the suit with Dixon, at private sale, for the sum of \$619.50. The sheriff recovered judgment upon said indemnity bond, and an appeal was taken by the defendants.

Appellants contend that the sheriff had no right or authority to sell said property at private sale; that in doing so he committed a trespass, and that it was immaterial whether he was directed or authorized to make such sale by the defendants; and this is practically the only point presented upon the appeal.

Certain authorities are cited by appellants to the effect that a sheriff will not be protected in a willful violation of the law, although directed by other parties to do the act, and that he cannot recover in such case upon an indemnity bond given to protect him therein. But these authorities have no application to the facts of this case. If, as contended by respondent, he was authorized to sell this property at private sale by O'Loughlin, and there was testimony to show that he was so authorized, he unquestionably had a right to make such sale. Upon the satisfaction of the judgment obtained by Dixon against the sheriff the title to said property passed from Dixon to the sheriff; although, under the circumstances, having seized it upon a writ of attachment issued in favor of O'Loughlin, it passed to him in trust for O'Loughlin. Consequently, it could then be no trespass against Dixon to sell the property in any way that the party saw fit to sell it. It could be no trespass against Hunt, the execution defendant in the original suit, for it was found not to have been his property, and he could make no claim to have it sold on the execution issued in that suit.

Complaint is made as to the expenses incurred by the sheriff in taking care of said property pending the litigation with Dixon. It was shown that the property consisted principally of Judson and giant powder, which had to be kept in an isolated place, and that it was necessary to have some one to look after it. There was also testimony to show that a keeper was employed to take charge of the property by direction of, and with the consent of, O'Loughlin,

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Syllabus.

and that the sheriff acted under direct authority from him in making the seizure and retaining the property, and in contesting the title with Dixon, and in selling it as he did; and the jury found in favor of the plaintiff on the issues made.

No error having been shown, the judgment rendered is affirmed.

DUNBAR, C. J., and HOYT, STILES and ANDERS, JJ.,
CONCUR.

[No. 1114. Decided February 20, 1894.]

THE TACOMA GROCERY COMPANY, *Appellant*, v. M: H.
DRAHAM, *Respondent*.

ATTACHMENT—UNVERIFIED AFFIDAVIT—APPEAL—OBJECTION NOT
RAISED BELOW—EXECUTION SALE—PRESUMPTION OF REGU-
LARITY.

Where, as the foundation for attachment proceedings, a paper was filed in the form of an affidavit, signed by the attorney of plaintiff, but there was nothing upon its face nor in the record to show that it was ever sworn to, the court could not obtain jurisdiction of the subject matter, and judgment of sale rendered in such proceedings would be an absolute nullity, which could be attacked without a direct proceeding for that purpose.

Where a case has been referred to a referee to take proofs and report same to the court, the refusal of the referee to grant a request for an adjournment, which was not objected to at the time, nor upon the trial before the court subsequently upon the report of the referee, cannot be raised as ground of error for the first time on appeal.

In an action to quiet title to land purchased upon execution sale, proof of the sale made by the sheriff under a valid judgment and execution, and the confirmation thereof by the court, will establish a *prima facie* presumption that the sale was regularly made.

Appeal from Superior Court, Mason County.

W. I. Agnew, and *J. W. Robinson*, for appellant.

C. W. Hartman, for respondent.

The opinion of the court was delivered by

HORT, J.—This action was brought by the appellant to quiet the title to a certain piece of real estate as against the defendant. The source of title of each of the parties was the same; both claimed by virtue of execution sales against Henry Bickle, jr. There was no personal service on the defendant, and the validity of the judgments and sales depends upon the regularity of attachment proceedings which were instituted at the time of the commencement of the actions. It clearly appears from the record that the sale under which appellant claims was the first one, and if valid conveyed to it a good title.

It is contended on the part of the respondent that the judgment under which this sale was made was absolutely void, for the reason that the court never obtained any jurisdiction of the subject matter. The ground of such contention is, that there was no affidavit filed with the clerk as a foundation for the attachment proceedings.

Upon this question the record shows that a paper was filed in the form of an affidavit signed by a person who represented himself as the attorney for the plaintiff, but there is nothing upon the face thereof to show that it was ever sworn to. Such being the case, the question is presented as to the force to be given such paper. If it should be treated as having no effect, then it must follow that the attachment proceedings founded thereon were absolutely void. It does not appear from the record that the paper was in fact sworn to. If it did, it is probable that under our liberal statute as to amendment of all papers in attachment proceedings, the omission of the officer to sign the jurat could be treated as a clerical error, and the proceed-

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Opinion of the Court — HORT, J.

ings sustained. But in the absence of proof to that effect, there is nothing to show that the facts set up in such paper ever had their truth vouched for by the oath of any person. In other words, the paper upon its face does not show that it is an affidavit, and there is no proof in the record to supplement the showing upon the face of the paper. It must, therefore, for the purposes of this case, be considered as no affidavit at all, and it must follow that there was no foundation whatever for the issuing of the writ of attachment, and that it was absolutely void.

Some cases have been cited by counsel for appellant where the absence of the signature of the officer to the jurat has been held not to be fatal to the proceedings. Such cases, however, are not numerous. We have been able to find only two which squarely establish such a doctrine. *Wiley v. Bennett*, 9 Baxt. 581; *Stout v. Folger*, 34 Iowa, 71.

These cases would be authority for the contention of the appellant that such omission did not render the proceedings void, if the facts shown by the record had been similar to those in the case at bar, but such was not the case. There it was made clearly to appear to the court that the affidavit had been in fact sworn to, and it was held that, as the required facts had been set forth in the form of an affidavit, and their truth vouched for by the oath of the party, he should not be deprived of his rights by reason of the inadvertent omission of the officer to sign the jurat. We have been unable to find a single case which went so far as to hold that the proceedings could be sustained where the statute required an affidavit without its being made affirmatively to appear in some manner that an affidavit was in fact made and filed. In our opinion, no title passed to plaintiff by virtue of the execution sale under which it claims title, for the reason that the judgment upon which such sale was made was absolutely void.

Appellant makes the further contention that, even if such results must follow from the failure to make and file an affidavit, the judgment could only be attacked in a direct proceeding for that purpose. This would doubtless be true if the action of the court in granting the judgment was simply erroneous, but it was more than that; it was void for the reason that the court never had any jurisdiction. Such a judgment is a nullity, and may be attacked in any place where rights are attempted to be asserted under it.

There is a point made in appellant's brief, that it should be relieved from the judgment by reason of the fact that it asked for an adjournment of the taking of proofs before the referee for the purpose of allowing it to produce at the adjourned day a witness to prove that the affidavit was in fact sworn to, and that the referee refused to grant such adjournment. If the appellant had sought relief from the action of the referee by a sufficient showing before him and in the lower court upon the presentation of his report, and had been unable to obtain it, this court could grant such relief. But nothing of this kind was done. The case was not before the referee for him to take the testimony and report findings of fact and law, but only that he might take the proofs offered, and report the same to the court; hence the action of the appellant in simply making a request for such adjournment, and, so far as the record shows, acquiescing in the refusal of the referee to grant the same, without being followed by any attempt to further secure its rights in that regard, will not justify us in interfering with the judgment on account of the refusal of the adjournment by the referee. Upon the report of the referee the case came before the court for trial, and if the appellant felt that it had been denied an opportunity to introduce such proofs as were necessary before the referee, it should have asked leave to introduce the same upon the hearing.

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Argument of Counsel.

The court below not only refused any affirmative relief on the part of the appellant, but, upon affirmative pleadings on the part of the defendant, quieted his title as against the plaintiff. It, therefore, becomes necessary for us to examine the proceedings under which the defendant claims title. Their regularity is in no manner attacked by the counsel for the appellant, excepting that the statement is made that the proceedings under the execution upon which the sales were made were not proven. None of these criticisms went to the jurisdiction of the court in entering the judgment and issuing the execution, and as it was proven that the sale had been made by the sheriff thereunder, and the proceedings on such sale had been regularly confirmed by the court, enough appeared to establish a *prima facie* presumption that the sales were regularly made.

The judgment of the lower court must be affirmed.

DUNBAR, C. J., and SCOTT, STILES and ANDERS, JJ.,
concur.

[No. 1122. Decided February 20, 1894.]

WILLIAM P. BOOK, *Appellant*, v. A. C. WILLEY, *Respondent*.

8	267
21	819

EVIDENCE—JUDGMENT LIEN—TO WHAT INTEREST ATTACHES.

In an action to foreclose a mortgage on certain real estate, to which one of the defendants interposes the defense that he has a paramount interest by reason of a judgment lien against a leasehold interest in the land, evidence is admissible to show that the actual interest of the judgment debtor in the lands is less than it is made to appear by the county records.

Appeal from Superior Court, Chehalis County.

Ben Sheeks, and Hogan & McGerry, for appellant:

The lien of a judgment is general, and attaches to the actual interest of the judgment debtor in lands, and not

to his apparent or colorable interest as the same may appear of record. 1 Black, Judgments, § 420; *Baker v. Morton*, 12 Wall. 150; *Buchan v. Sumner*, 2 Barb. Ch. 207; *O'Rourke v. O'Connor*, 39 Cal. 442; *Norton v. Williams*, 9 Iowa, 528; *Mansfield v. Gregory*, 9 N. W. 87; *Sanford v. McLean*, 3 Paige, 117; *Coombs v. Jordan*, 3 Bland, 292; *Holden v. Garrett*, 23 Kan. 98; *Unknown Heirs v. Kimball*, 4 Ind. 546; *Churchill v. Morse*, 23 Iowa, 229; Jones, Mortgages, § 460, and cases there cited.

J. C. Cross, and *Linn & Bridges*, for respondent.

The opinion of the court was delivered by

SCOTT, J.—This action was brought by appellant in the superior court of Chehalis county to foreclose a mortgage on certain real estate. Said mortgage was executed by John and Sarah Pace Henson to appellant, February 7, 1891. Respondent Willey and defendant Cormier were made parties defendant, under an allegation in the complaint that they had or claimed some lien or interest in the mortgaged premises which was alleged to be subject to the mortgage lien of appellant. The defendants, excepting respondent Willey, failed to answer, and default was entered against them. Respondent Willey answered and admitted the execution and non-payment of the note and mortgage set forth in the complaint; and he further alleged that he had an interest in said lands which was superior to the lien of appellant's mortgage.

The respondent's claim is based upon the following facts: That the defendant John Henson, on the 28th day of July, 1890, executed a written contract of lease of said lands to the defendant Cormier for the term of five years from said date, at an annual rental of two hundred dollars; which lease provided that at the termination thereof the lessee might remove any building erected by him upon the

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premises during the existence of the lease; and said Henson also gave Cormier an option to purchase the premises at any time during the term of the lease for a sum specified. And said respondent further alleged that he recovered a judgment in the superior court of Chehalis county against said defendant Cormier, and that on the 28th day of January, 1893, he caused a transcript thereof to be filed in the office of the county auditor of said Chehalis county, thereby making such judgment a lien upon the real estate of said defendant Cormier by virtue whereof respondent claimed a lien upon the leasehold interest of Cormier in the mortgaged premises, and that the same was paramount to the mortgage of appellant, and he asked for a dismissal of the action as to him.

Appellant set up, by way of reply to this answer, that after the recording of appellant's mortgage and on the 3d day of August, 1891, Cormier then being in default in payment of rent on the lease aforesaid, by mutual agreement between said John Henson and said Cormier, said lease was abrogated and declared to be of no further force, and a new contract in writing was on said date entered into between said Henson and said Cormier, by the terms of which Cormier was to buy the mortgaged premises from Henson subject to the lien of appellant's mortgage, and that at said time Cormier assumed the payment of appellant's mortgage, and thereafter paid part of the debt thereby secured.

At the trial respondent offered evidence in support of the allegations contained in his answer, and in rebuttal appellant offered in evidence the deposition of said Cormier wherein he testified in substance that before the alleged recovery by respondent of his judgment against him said lease had been forfeited by him, and that it was abrogated and set aside by mutual agreement of both parties to it; and which deposition also contained further testimony in

support of the other matters alleged in appellant's reply aforesaid.

The court, upon objection by respondent, refused to admit this deposition as evidence, whereupon appellant offered to prove the facts alleged in his reply by another witness, and such testimony was likewise excluded. It seems these rulings were based on the ground that appellant could not prove any fact in contravention of Cormier's interest in said property as shown by the records in the auditor's office, and on the ground that respondent's judgment became a lien upon such leasehold interest as disclosed by the records, regardless of what the actual claim or interest of said lessee was in said mortgaged premises at the time the lien attached. This was error. The lien of said judgment could only attach upon the actual interest of the judgment debtor in said lands, regardless of the fact that it appeared by the county records that he had a different or greater interest therein. We believe the authorities are practically unanimous in support of this proposition.

Consequently, the testimony offered by appellant in support of the matters alleged in his reply should have been admitted, and it follows that the judgment must be reversed, and the cause remanded for further proceedings.

DUNBAR, C. J., and HOYT, STILES and ANDERS, JJ.,
concur.

[No. 1232. Decided February 20, 1894.]

THE STATE OF WASHINGTON, *on the relation of M. F. Hamilton*, v. SUPERIOR COURT OF JEFFERSON COUNTY.

CERTIORARI—JURISDICTION OF SUPREME COURT—AMOUNT IN CONTROVERSY.

The supreme court has no jurisdiction to review the action of the superior court by means of certiorari proceedings when the original amount in controversy in the case does not exceed the sum of \$200, and the action does not involve the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute.

Original Application for Certiorari.

R. W. Jennings, for relator.

The opinion of the court was delivered by

DUNBAR, C. J.—This is an application for a writ of certiorari. The affidavit upon which this application is based shows that the court made an order that the new matter or affirmative defense pleaded in answer to the complaint be made more definite and certain. Upon failure of the defendant to amend, the court struck out the entire answer, including the direct denials, and rendered judgment against the relator.

Conceding the affidavit to correctly state the action of the court, it is plain that the court committed error in extending the order beyond the striking of the affirmative matters pleaded in defense.

But the original amount in controversy in this case does not exceed the sum of two hundred dollars, and the action does not involve the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. Hence, there can be no appeal under the provisions of § 4 of art. 4 of the constitution of the State of Washington, and to allow the relator to obtain a reversal of the judgment

8	271
15	696
8	271
26	236

through the medium of certiorari, which he could not obtain by appeal, would be to render nugatory the provision of the constitution above quoted.

The court had jurisdiction of the subject matter and of the parties to the action, and it was evidently the intention of the constitution to vest exclusive discretion in the superior court in cases where the amount involved did not exceed the sum of \$200.

The writ, therefore, will be denied.

STILES, SCOTT, HOYT and ANDERS, JJ., concur.

8 273
10 560
36* 29
39* 157

[No. 1085. Decided February 21, 1894.]

THE STATE OF WASHINGTON, *Respondent*, v. G. E. CARTER,
Appellant.

SEDUCTION—WHAT CONSTITUTES—IMPEACHMENT OF WITNESS—
MISCONDUCT OF WITNESS—BRIEFS—REFERENCES TO RECORD.

Where the inducements for sexual intercourse held out by a man to a girl of twelve years of age consisted in kissing and fondling her and feeling of her person, and in representations to her that it was not wrong to have sexual intercourse, and that he would not hurt her, these representations being made and this conduct occurring upon a number of occasions when he attempted to have intercourse with her without accomplishing penetration, and also thereafter when he succeeded, they are sufficient, in view of the girl's tender age, to constitute the offense of seduction.

Where the prosecution, in order to avoid a continuance on account of the absence of a material witness of the accused, has admitted that the testimony set forth in the affidavit for continuance would be given by such witness, if present, the state cannot subsequently undertake to impeach said witness by introducing another witness to testify that the absent witness had made different statements to him.

Where the prosecuting witness in a seduction case takes her child to the witness stand, and it appears that this was done by di-

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rection of the prosecuting attorney solely for the purpose of exhibiting the child to the jury and of exciting prejudice against the defendant, such action is sufficient to entitle defendant to a new trial.

Where many of the points argued in appellant's brief purport to be based upon parts of the record, without indicating the pages thereof, the court will not hear the appeal until after an amendment of the brief upon terms imposed.

Appeal from Superior Court, Lincoln County.

Thomas C. Griffiths, and Blevins & Neal, for appellant.

J. W. Merritt, Prosecuting Attorney, for The State.

The opinion of the court was delivered by

SCOTT, J.—The defendant was convicted of seduction, and has appealed.

It is contended that the proof was insufficient to show any seduction, in that there was no evidence of any promise, or seductive influences, on the part of the defendant, and that the verdict was contrary to the weight of the evidence.

There was testimony to show a number of attempts by the defendant to have sexual intercourse with the prosecuting witness, beginning when she was but twelve years of age. Such attempts were carried to the extent of a contact of the sexual organs, but it appears by the testimony of the complaining witness that there was no actual penetration until after several such attempts had been made. She was unable to name the first time when the defendant did have complete sexual intercourse with her, but her testimony, if true, shows that he did have intercourse with her a great many times, extending over a period of two years, or more. Her testimony was unsatisfactory in many respects, as it appears by the record, but its truthfulness was a matter for the jury to determine. She was but fifteen years old at the time of the trial, and

had recently given birth to a child. She was corroborated to some extent by other witnesses. The defendant was a married man, twenty-five years of age. He denied having had any sexual intercourse with the complainant, or of having attempted to have any. As to the inducements held out, the testimony was meager. There was testimony that he told her that he would not hurt her, and would not do her any harm, that it was not wrong to have sexual intercourse, and told her not to tell any one; that he kissed and fondled her and felt of her person. According to the complainant's testimony, these representations were made, and this conduct occurred, upon a number of occasions when he attempted to have intercourse with her, and also thereafter when he succeeded.

We would not feel justified, under all the circumstances proven, in interfering with the conviction upon the ground of the improbability of the truthfulness of her testimony, and we think the inducements held out, considering her tender age, were sufficient to constitute the offense seduction.

In considering this case, we cannot allow the condition of appellant's briefs and the record to pass unnoticed. A multitude of questions are argued which seem to have no foundation in the record, and for that reason some which may arise on a new trial, and which would otherwise be noticed, must be passed. Many of such points purport to be based upon parts of the record the pages whereof are not indicated in his brief, thus necessitating searches through the entire transcript by the court, and often resulting in a failure to find any such. Had this been fully understood by the court before the argument, the case would not have been heard, and severe terms would most likely have been imposed upon counsel before an amendment thereof would have been permitted to get the case in a condition to be heard.

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One of the points urged by appellant as error has its foundation in a motion which he made for a continuance of the trial upon the ground of the absence of a material witness. It is contended by appellant that the prosecuting attorney, to avoid a continuance, admitted that certain testimony set forth in the affidavit would be given by such witness if present, and that the court allowed certain parts of it to be considered as given. After a diligent search we have failed to find any such admission or action by the court set forth in the record. However, counsel for the respondent in his brief practically admits that such action was had in the premises, and this view is strengthened by the fact that testimony was introduced by the state to impeach the witness in question, which would, of course, have been entirely irrelevant and inadmissible if the testimony of such witness was not considered in the case. In view of this, and of the fact that it is a criminal case, and that upon the oral argument the case was treated as though such testimony had been given, we shall consider it as of record.

The witness referred to was one Mrs. Franz, and it appears by the affidavit in question that she would testify that the prosecuting witness told her after the seduction complained of, in substance, that she had had sexual intercourse with a number of men running through a period of years, and undertook to name all of the men with whom she had been so intimate, and that the defendant was not one of them. At the close of the case both for the state and the defendant, the court allowed the prosecuting attorney to call one Dr. Whitney, and allowed him to testify that he had a conversation with Mrs. Franz the Sunday before, during which she told him that she had never talked with the prosecutrix about the case, etc. This evidence was offered for the purpose of impeaching the credibility of Mrs. Franz, and would have been inadmissible for any other purpose.

We are of the opinion that this was error. While the

state, under our statute, § 338 of the Code of Procedure, relating to continuances, would probably have been permitted to contradict the truthfulness of the testimony which it had admitted would be given by an absent witness in order to avoid a continuance of the trial, yet, in our opinion, it would not be authorized to undertake to impeach said witness, at least under the circumstances of this case, and in the way in which she was sought to be impeached. It is not contended that there was anything in the agreement admitting that this witness would so testify, or in the action of the court in admitting the testimony, to the effect that such impeaching testimony might be given, or that the attention of counsel for the defendant was in any wise called to the fact that an impeachment of her would be attempted. Had Mrs. Franz been present, and have given this testimony, it would have been necessary to have laid a foundation for this attempted impeachment by asking her with reference to such conversation with Dr. Whitney, etc., before the state would have been allowed to introduce it.

It is further contended that there was error in the following: It appears that near the conclusion of the case on rebuttal the prosecuting witness was recalled for the purpose of being examined as to some unimportant matter, and she took her child with her upon the stand. While there, upon objection being made to her having the child with her, she testified that she had been directed by one of the state's attorneys to so take the child, and it appears that this was done solely for the purpose of exhibiting the child to the jury and of exciting prejudice against the defendant, and we are of the opinion that such action was sufficient to entitle the defendant to a new trial.

Reversed.

ANDERS, J., concurs.

HOYT, J., dissents.

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Concurring Opinion — STILES, J.

DUNBAR, C. J. (*concurring*).—I concur in the result for the reason stated by me in the case of *Whitcher v. State*, 2 Wash. 286 (26 Pac. 268), viz., that a girl under the age of sixteen years cannot be a subject of seduction, not being of a consenting age, and, therefore, if there was any crime committed it was rape. I also concur in the last point decided by Judge SCOTT, as I am opposed to any theatrical manifestations in the trial of a cause, especially in the trial of a criminal action.

STILES, J. (*concurring*).—I concur upon the ground stated by DUNBAR, C. J., and because the case developed was that of rape, in fact, aside from the statute in regard to the age of consent, rather than one of seduction. *State v. Lewis*, 48 Iowa, 578; *Croghan v. State*, 22 Wis. 424; *People v. Royal*, 53 Cal. 62.

There was also error because the state was not put to its election as to which act of alleged intercourse it would rest the prosecution upon. The court allowed the proof to range over numerous such acts extending through a period of several years, thus leaving it entirely the subject of conjecture as to what particular act any given jurymen may have selected as that upon which he based a conviction, in a case where it needs no argument to show that the alleged crime, if committed at all, was committed upon a definite and ascertainable day. *People v. Jenness*, 5 Mich. 305; *People v. Clark*, 33 Mich. 112.

I also disagree with that part of the decision which finds any corroboration of the prosecutrix. Her statement as to the material facts stood absolutely contradicted by that of the defendant, and unless the jury took into consideration the fact that she had a child, and argued therefrom that the defendant must have been its father, and therefore must have seduced the mother, I am unable to see how the verdict could have been arrived at. But the prosecutrix did

not pretend that defendant was her child's father, and testified to no act of intercourse with him nearer than sixteen months to the child's birth, which made the introduction of the evidence concerning the child, and especially its production to the view of the jury, grossly incompetent.

8	278
J14	619

8	278
27	722

8	278
37	228

8	278
41	434

[No. 948. Decided February 23, 1894.]

NELLIE M. SCURRY, *Appellant*, v. THE CITY OF SEATTLE,
Respondent.

CONSTITUTIONAL LAW—CLAIMS AGAINST CITIES—LIMITATION ON
RIGHT OF ACTION.

The provision of art. 4, §33 of the freeholders' charter of Seattle, declaring that no action shall be maintained against the city for any claim for damages, unless such claim has been presented to the city council and filed with the city clerk within six months after the time when such claim for damages accrued, is not unconstitutional and void as being in contravention of the statute of limitations with reference to the commencement of actions.

Appeal from Superior Court, King County.

Metcalf, Little & Jurey, for appellant.

George Donworth, and *James B. Howe*, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—This is an action brought by appellant against the city of Seattle for damages alleged to have been sustained by reason of grading a certain street. The action was tried in the superior court, and judgment rendered for the city, from which judgment an appeal is taken to this court.

There are several questions involved in this case which are ably presented by counsel both for appellant and re-

Feb. 1894.] Opinion of the Court — DUNBAR, C. J.

spondent, but the view which we take of the third proposition discussed renders unnecessary an investigation of the others. Sec. 33 of art. 4 of the freeholders' charter provides that all claims for damages against the city must be presented to the city council and filed with the clerk within six months after the time when such claim for damages accrued; and further provides that no action shall be maintained against the city for any claim for damages until the same has been presented to the city council and sixty days have elapsed after such presentation. It is conceded in this case that the claim for damages was not presented in accordance with the requirements of said § 33; but the contention of the appellant is that § 33 of art. 4 of the freeholders' charter is unconstitutional and void for the reason that it is in contravention of the laws of the state concerning limitations of actions.

Sec. 10 of art. 11 of the constitution of the State of Washington provides that cities of a certain class, which includes the respondent city, shall be permitted to frame charters for their own government consistent with and subject to the constitution and laws of this state. Is, then, the limitation imposed upon the presentation of the claim for damages against the city consistent with and subject to the constitution and laws of the state? We think it is. It is true that, under the laws of the state, an action of this kind could be brought within three years, but it has never been held that even a statute which made provisions for the presentation of a claim within a certain time was in any way in contravention of the statute of limitations with reference to the commencement of actions. If this requirement of the charter had been complied with, the appellant would have had the full statutory period in which to bring her action. It cannot be disputed that the legislature would have had power to have made the provision that is made by § 33 of art. 4 of the charter, and that if

the provision had been so made by the legislature it would not have been in contravention of the statute of limitations. If this be true, the same power was granted by the constitution to the city, and the enactment by it would no more be in contravention of the law than would the same enactment by the legislature.

Sec. 559 of the General Statutes, which is in relation to cities of the second class, provides that all accounts and demands against such city, other than such as are chargeable or payable out of the school fund, must be presented to the city council, duly itemized, and accompanied by an affidavit of the party or his agent, stating the same to be a true and legitimate claim against the city for the full amount for which the same is presented, and that the same accrued as set forth, and with all necessary and proper vouchers, within one year from the date the same accrued; and any claim or demand not so presented within the time aforesaid shall be forever barred, etc.

It follows, then, from the powers given by the constitution to the city to legislate on all proper subjects of legislation for the government of the city, that if the statutory § 559, above referred to, can be sustained and held not to be in conflict with the general law of limitation, § 33 of art. 4 of the charter of the city of Seattle can be sustained for the same reason. The limitation of an action and a provision in a statute or a charter for the manner or time of presenting a claim are two entirely different propositions and are in no wise conflicting, provided the time allowed for presenting the claim is within the statute of limitations.

There is no question of retroactive force in this case. While it is true that the damages accrued before the adoption of the freeholders' charter, yet it is equally true that more than six months had elapsed from the adoption of the charter before the presentation of the claim. Under the

rulings of this court in *Packscher v. Fuller*, 6 Wash. 534 (33 Pac. 875), and *Moore v. Brownfield*, 7 Wash. 23 (34 Pac. 199), the limitation as to rights of action already accrued began to run from the date of the taking effect of the act. The only limitation of the right of the city to make a provision concerning the time in which a claim for damages should be presented would be the limitation of a reasonable time. We think that six months is a reasonable time; and believing that the provision of the charter in question is constitutional, the judgment will be affirmed.

ANDERS, SCOTT, HOYT and STILES, JJ., concur.

[No. 1004. Decided February 23, 1894.]

8 281
17 679

JOHN KLOSTERMAN, *Respondent*, v. MASON COUNTY CENTRAL RAILROAD COMPANY AND ALLEN C. MASON, *Appellants*, WHEELER, OSGOOD & CO. AND O. F. COSPER, *Intervenors and Appellants*.

SETTING ASIDE FRAUDULENT CONVEYANCE — PROCEEDINGS SUPPLEMENTAL — PLEADING — INSOLVENT CORPORATION — TRANSFER TO MORTGAGEE IN PAYMENT OF DEBT.

The provisions of Code Proc., tit. 8, ch. 6, governing proceedings supplementary to execution, do not afford an adequate remedy for the purpose of cancelling and setting aside a fraudulent conveyance of real estate, and resort may consequently be had to a court of equity for relief.

In an action to set aside a fraudulent conveyance, an allegation in the complaint that plaintiff had obtained a specific lien upon the property sought to be subjected to his judgment is unnecessary.

The transfer by an insolvent corporation of all its property to the mortgagee thereof is not such a preference over unsecured creditors as to constitute a fraudulent conveyance; nor is such transfer inhibited under the provisions of art. 12, § 8 of the constitution, declaring that no corporation shall alienate any franchise so as to re-

lieve the franchise, or property held thereunder, from the liabilities incurred in the operation, use or enjoyment of such franchise.

Appeal from Superior Court, Mason County.

James Wickersham, and Henry S. Tremper, for appellants.

Allen & Powell, for respondent and intervenors.

The opinion of the court was delivered by

ANDERS, J. — The Mason County Central Railroad Company was incorporated in the year 1888, under and by virtue of the laws of the then Territory of Washington. The objects for which it was formed, as indicated in its articles of incorporation, were to build and operate a railroad from Shelton, in Mason county, to some point on the Chehalis river, and to carry on a general lumbering and sawmill business at said town of Shelton. It would seem, however, that the contemplated railroad was not designed or intended as a road for general traffic, but simply as a means of transportation of logs to the company's mill.

The corporation, anticipating an extensive demand for lumber, purchased a large quantity of timber land, mostly in Mason county, and constructed and equipped for logging purposes about six miles of railroad such as is commonly used by mill companies. Its entire property, including mill and appurtenances, lands and railroad, cost in the neighborhood of \$125,000. But, in conducting its business, the company found it necessary, from time to time, to borrow money, which it did from various persons and companies, and mortgaged its property to secure the payment thereof. These loans were made by and through the appellant Allen C. Mason, who was a loan broker in Tacoma, but not a stockholder in the appellant corporation. The promissory notes secured by these mortgages, except several for small amounts which were given to Mason him-

self, were indorsed by Mason before delivery to the mortgagees.

In July, 1891, this mortgage indebtedness amounted to some fifty thousand dollars, while, according to the evidence in the record, the entire property of the corporation had so depreciated in value that, at that time, it was not worth more than that sum, even if it could have been sold in the market at all. In addition to the mortgage securities upon which Mason was liable, the company owed Mason \$10,000 which he had advanced to it, and for which he held no security. Being otherwise unable to pay this indebtedness, the company, on July 27, 1891, in consideration thereof, and the payment to it of \$1,200 in cash, sold and conveyed to said Mason all of the property covered by mortgage, in fact, practically all of the property then owned by it. The deed even purported to convey all the franchises and privileges of the company, but it appears from the testimony of its president that the company did not intend to convey any of its corporate privileges, and that he did not notice, at the time the deed was executed, that it was therein so stated.

It appears that when this deed was executed the railroad company owed other parties, but of that fact Mason had no knowledge whatever. Among its creditors was the respondent, Klosterman, who held a claim against it for something over \$300, for goods sold and delivered. And it further appears that on July 20, 1891, he commenced an action against the railroad company to recover the amount of his claim, but neither Mason nor the defendant corporation had any knowledge of it until after the execution of the deed on the 27th of July. On August 27, 1891, judgment was obtained against the defendant for the sum of \$323.99, and costs, taxed at \$15.80. Thereafter execution was issued and returned "no property found." Thereupon the respondent, Klosterman, as Klosterman & Co., began

this action against the appellants to set aside the deed of July 27, 1891, and to subject the property therein described to the payment of his judgment; and for cause of action, alleged in his complaint, among other things, "that the said conveyance was without consideration, was made in secret trust for said company, and was made with the intent on the part of said company and of said Allen C. Mason to hinder, delay and defraud creditors of the Mason County Central Railroad Company, and especially this plaintiff," and "that the said company has no other property subject to execution out of which the plaintiff's judgment could be satisfied, and is wholly insolvent, and was so insolvent at the date of the aforesaid conveyance, and the defendant Allen C. Mason well knew the fact." A general demurrer to the complaint was interposed and overruled, after which a trial was had upon the issues tendered by the complaint, and the court, notwithstanding it found as a fact that it did not appear that Mason knew of the defendant corporation's debts, other than those for which he had become personally liable, and that at the time of the transfer to Mason the property conveyed to him was not worth more than the amount of the indebtedness for which he had become responsible, adjudged the conveyance void and the property therein mentioned subject to the lien of the plaintiff's judgment. From this judgment and decree the defendants appealed.

It is contended by the appellants that the respondents had a complete and adequate remedy at law under ch. 6, title 8 of the Code of Procedure, by proceedings supplementary to execution, and were, therefore, not entitled to equitable relief. But without reviewing the authorities cited, we think that an inspection of the statutes above mentioned will clearly show that the remedy therein provided is not adequate for the purpose of cancelling and setting aside a fraudulent conveyance of real estate. As

was said by the supreme court of Colorado in *Allen v. Tritch*, 5 Col. 226:

“The right of a judgment creditor to equitable relief in case of the fraudulent transfer of real estate by the judgment debtor is well settled. . . . No like or equivalent remedy can be had by proceedings supplemental to execution, and it exists unimpaired as before the adoption of the code.”

It may be conceded that whenever such proceedings are clearly adequate to afford the relief demanded, they are exclusive and a substitute for former remedies, but where they are not, resort may still be had to a court of equity for relief in all cases falling within the settled jurisdiction of that court. Freeman on Executions (2d. ed.), § 394; *Ludes v. Hood*, 29 Kan. 49; Bump, Fraud. Conv. (3d ed.), p. 530.

We think the objection of appellants, that the complaint fails to state a cause of action because it does not allege that plaintiff had obtained a specific lien upon the property sought to be subjected to his judgment, is not well taken. The complaint shows that the plaintiff had exhausted his legal remedies without avail; that the property alleged to have been fraudulently transferred is necessary for the satisfaction of his judgment, and that the plaintiff is in a situation to perfect a lien thereon, upon the removal of the alleged fraudulent deed, and that is all that is necessary to be set forth in a complaint in actions like this. Bump, Fraud. Conv., p. 537; Wait, Fraud. Conv., § 73; *Almatt v. Leper*, 48 Mo. 319; 2 Wait, Actions and Defenses, 414.

It is claimed on behalf of appellants that the judgment of the lower court must be reversed for the reason that the evidence does not show any fact sustaining the allegations of the complaint. There is much force in this suggestion, for, in our judgment, there is no evidence showing either a want of consideration for the transfer of the property in

question, or that the property was to be held in trust for the railroad company, or that the transfer was made with intent to hinder, delay or defraud creditors. But, notwithstanding this, it is contended by the respondent that inasmuch as the corporation was insolvent at the time its deed was made to Mason, the conveyance was necessarily void as to creditors, for the reasons (1) that such property was a trust fund for the payment of all of the company's debts, and (2) that the sale was in contravention of § 8, art. 12 of the state constitution. This was the view adopted by the lower court in rendering the judgment complained of.

Conceding that the property of an insolvent corporation is a trust fund for the payment of its debts, and that under such circumstances such corporation cannot ordinarily prefer one creditor over another, does it necessarily follow that the transaction under consideration was void as to unsecured creditors? The answer to this question depends largely upon the power of corporations in this state to manage and dispose of their property. That power is expressed in the statute in this language: "To purchase, hold, mortgage, sell and convey real and personal property." Gen. Stat., § 1500. From this comprehensive provision it will be seen that the appellant corporation had a right, in the proper conduct of its business, to mortgage its property to secure its debts. And this being so, it had a right to sell, in good faith, any or all of its property in payment of its mortgage liens. 2 Rorer, Railroads, p. 880; and see *Railroad Co. v. Howard*, 7 Wall. 392; *Warfield v. Marshall County Canning Co.*, 72 Iowa, 666 (34 N. W. 467). In the absence of legislative restrictions, or some limitation arising from its nature, a corporation may dispose of any property it has a right to acquire, in the same manner as an individual. Pierce, Railroads, 503. By legislative permission it may even dispose of its franchise. See *Willamette Mfg. Co. v. Bank of British Columbia*, 119

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U. S. 191 (7 Sup. Ct. 187). And a deed purporting to convey the property and franchise may be valid as to the former, though invalid as to the latter. *Coe v. Columbus, etc., R. R. Co.*, 75 Am. Dec., p. 549, note.

In this case there is no showing that the appellant corporation ever acquired any of its property except by purchase. And, under these circumstances, it was under no obligations to the public to retain its property or continue its business longer than it deemed it expedient to do so. In other words, no one but its creditors had a right to question the disposition it made of its property. The statute, as we have seen, conferred upon it the power to dispose of its property, both "real and personal," and the constitution would seem to imply a right even to dispose of its franchise, but not in such a manner as to relieve the franchise or property held under it from certain liabilities of the grantor. Const., art. 12, § 8.

The learned counsel for the respondent and the intervenors insist that, by virtue of the above cited provision of the constitution, the property in question is still subject to the claim of the respondent. But we are not of that opinion. That provision declares, in effect, that, if a corporation shall lease or alienate its franchise, neither the franchise or property held thereunder shall thereby be relieved from liabilities contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges. This is but a declaration of what the courts have generally held to be the law, irrespective of constitutional limitations or provisions. *Chicago, etc., Ry. Co. v. Chicago Third Nat. Bank*, 134 U. S. 376 (10 Sup. Ct. 550). But we do not think that there is anything in the law or this provision of the constitution which inhibits a corporation from voluntarily transferring property for the payment of debts for which the property so transferred is legally bound.

Mason is, therefore, the absolute owner of the property

claimed by him, unless the transaction between him and the railroad company is void as to the respondent. That the sale to him was intended to be absolute is abundantly shown by the evidence. The property in his hands is, of course, subject to the mortgages which were upon it at the time of the transfer. And so far as we are able to determine, from a careful consideration of all the evidence in the record, these mortgages are valid liens. Their payment, therefore, by a conveyance of the property at its value cannot be avoided as being a preference of one creditor above another.

This case is easily distinguishable from *Thompson v. Huron Lumber Co.*, 4 Wash. 600 (30 Pac. 742), in which this court set aside a fraudulent and preferential mortgage. This property was held for these debts at all events, irrespective of the claim of respondent; and as the evidence is clear that it was not worth more than the amount for which it was pledged and sold, it follows that the respondent could not have been injured by the transaction complained of.

The cases of the intervenors, Wheeler, Osgood & Co., and O. F. Cosper, are not here upon the merits, and therefore cannot now be finally disposed of. Their complaints show that they base their right to recover upon the same facts relied on by the respondent, Klosterman. But they have appealed from judgments sustaining demurrers to their respective complaints; and as we are clearly of the opinion that they had a right to intervene in the original action, and that their respective complaints state facts sufficient to constitute a cause of action, the judgments of the lower court as to them must be reversed.

For the foregoing reasons, the judgment of the lower court in favor of the respondent, Klosterman & Co., is reversed, and the action dismissed; and the judgments in the cases of the intervenors, Wheeler, Osgood & Co. and O. F.

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Cosper, are also reversed, and the causes remanded with directions to overrule the demurrers to their complaints.

DUNBAR, C. J., and HOYT, SCOTT and STILES, JJ.,
concur.

[No. 1055. Decided February 23, 1894.]

THE TACOMA BUILDING AND SAVINGS ASSOCIATION, *Appellant*, v. THOMAS M. CLARK AND JULIA C. CLARK,
Respondents.

RE-TRIAL AFTER REVERSAL—LAW OF CASE—BOUNDARIES—CONFORMITY WITH GOVERNMENT SURVEYS—LIMITATIONS—RECOVERY OF REAL ESTATE.

Where a cause has been reversed upon appeal and sent back for re-trial, the failure of the lower court to comply with the directions for re-trial is ground of error.

Where the custom of surveyors in laying out plats and in running lines is to make them conform to the nearest lines of the government survey, if such lines vary from the true lines upon which they should have been run, the boundary lines given in a deed of conveyance as running north and south and east and west will be construed as conforming with the variations in the nearest lines of the government survey.

In order to bar an action for the recovery of real estate under Code 1881, §26, adverse possession must have been maintained for a period of ten years subsequent to the taking effect of that statute.

Appeal from Superior Court, Pierce County.

H. F. Garretson, and Parsons, Corell & Parsons, for appellant.

Parker & Williamson, for respondents.

The opinion of the court was delivered by

HOYT, J.—The court decided, upon the former appeal in this cause (2 Wash. 203, 26 Pac. 253), that the bound-

ary lines of the land conveyed by the deed under which the respondents hold should be laid out north and south and east and west without reference to any variation in the line of the government survey, which was taken as the initial point in such description, unless it should be made to appear that the custom among surveyors throughout the state, and especially in the city of Tacoma, was, in laying out plats, to construe the direction given in the instrument of conveyance by the aid of the nearest government survey line, and to run such direction in accordance therewith, and if such line varied from the true direction upon which it should have been run, to so vary the directions of the deed as to make them correspond with such variation in the government survey; and the cause was reversed, and remanded with instructions to admit proof as to the custom of surveyors in that regard. Upon the re-trial of the case the court allowed certain testimony tending to establish such a custom, but refused to allow the appellant to introduce such proof as it desired in regard to the custom outside of the city of Tacoma. In thus excluding the testimony offered by the appellant the court failed to comply with the directions for re-trial given by this court, and therefore committed error.

In our opinion, however, without the aid of such further proof, the practically undisputed testimony established the fact that the custom of surveyors was to so vary the line of the direction contained in the deed of conveyance under which they were making the survey as to make it correspond with the variation from the true direction of the nearest government survey line. The testimony of every witness introduced on the part of the appellant tended to establish this fact. They all testified in general terms that such was the custom, and that such would be their action in laying off such lines, and several of them testified directly that in running the lines of the particular convey-

ance under which respondents hold they would run parallel with, and at right angles to, the nearest government line, and that such would be the action of surveyors generally according to well established custom. The witnesses introduced on the part of the respondents testified to substantially the same custom, but make some attempt to show that in this particular case the line was not so run. But we think that such fact, if it was a fact, could not affect the rights of the parties to this action.

It follows that under the undisputed proofs upon this question, and the facts found by the court as to the position of the land in question, the appellant was entitled to judgment, unless the defense of the statute of limitations interposed by the respondents is sufficient to warrant a judgment in their favor. The undisputed proofs showed that there had not been possession for twenty years, and it appeared from the record that the case was commenced within ten years after the passage of the law of 1881, which reduced the statute of limitations as to the recovery of real estate from twenty to ten years. Hence, under the former rulings of this court as to the construction to be given to the statute of 1881 (Code 1881, § 26), it must be held that the proofs did not warrant the finding of the court that the respondents were entitled to any rights by virtue of the statute of limitations.

It follows that the findings and judgment of the superior court were erroneous, and, as it appears from the proofs as applied to the law as we find it that the judgment should have been in favor of the plaintiff, we see no reason for a re-trial. The judgment will be reversed, and the cause remanded with instructions to grant the relief prayed for by the appellant.

DUNBAR, C. J., and SCOTT and ANDERS, JJ., concur.

STILES, J., not sitting.

[No. 1092. Decided February 23, 1894.]

THE STATE OF WASHINGTON, *Respondent*, v. WILLIAM C.
EDDON, *Appellant*.

HOMICIDE—EVIDENCE—GOOD CHARACTER OF DECEASED—DYING
DECLARATIONS—WEIGHT OF—PEREMPTORY CHALLENGES TO
JURORS—METHOD OF EXERCISING.

In a prosecution for homicide it is not competent to show the peaceable disposition or character of the deceased, or his good reputation, unless it has been assailed by the defense, although proof of the good character of the defendant may have been put in evidence. (Hoyt and Scott, JJ., dissent.)

The dying declaration of deceased calling witnesses to note the fact that he was unarmed is inadmissible as a part of the *res gestæ*.

An instruction that when dying declarations are before the jury they are to be treated as the other evidence in the case, is erroneous, as the same weight should not be attached to such testimony as to that of witnesses who can be subjected to cross-examination.

Construing all the statutory provisions together on the subject of challenges to jurors, the defendant must, in a prosecution for homicide, exercise two peremptory challenges to one by the state, until the twelve and six peremptory challenges allowed them respectively are exhausted.

Appeal from Superior Court, Lincoln County.

Thomas C. Griffiths, for appellant.

C. H. Neal, Prosecuting Attorney, and *J. W. Merritt*, for The State.

The opinion of the court was delivered by

DUNBAR, C. J.—At the time of the transaction out of which this trial grows, the defendant, William C. Eddon, was a resident of the town of Sprague. He owned a stock ranch about forty miles from Sprague, then in possession of Eddon's tenant, one Samuel Carlton. The day previous to the shooting Eddon had come to the ranch and remained over night at his tenant's house. The shooting

8	292
420	463
8	292
432	36
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42	550

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took place early in the morning of the 1st day of July, 1892. Adjoining this farm one Peter Meyers lived. Meyers had foreclosed a mortgage which he held on the ranch occupied by Carlton and owned by Eddon, and at the foreclosure sale bought the ranch himself. Eddon would not yield possession and out of this the controversy grew.

The testimony shows that on the morning of the shooting Meyers, with his hired man, John Burfine, in passing from his home to some point of destination beyond, went near that portion of the Eddon ranch where the stable was situated. They had gotten past the house some little distance when Meyers turned his horse and rode back to a point in the lane opposite the stable, and called to Carlton whom he saw, asking him if Eddon was there, Eddon being then in the barn. Carlton replied that he was, whereupon Meyers said: "Tell the damn, dirty, low-flung son-of-a-bitch to come out here. I want to see him." Carlton testifies that he told Eddon that Meyers wanted to see him, not repeating to him the violent language which Meyers used. This information being imparted to him, Eddon went out. Meyers, upon seeing him, commenced using violent and abusive language, threatening to thrash him, etc., and calling him the name above mentioned. Meyers descended from his horse and hitched it, and started towards the fence, there being a fence between him and Eddon. Here there is a contradiction in the testimony, Meyers' testimony by dying declaration being, that after he called Eddon a "son-of-a-bitch," Eddon drew his revolver and told him to take it back. He replied that he would not take it back, and told Eddon to put it up. These expressions passed between them two or three times, and Eddon fired, shooting Meyers through the body. While Eddon's version is that Meyers told him to come out there and he would stamp him into the road. Eddon

declared that he would not come, whereupon Meyers insisted that he would go to him, all the time cursing and damning and using violent words and making violent gestures; and he, believing that he was in danger of great bodily harm, fired upon Meyers. The result was that Meyers died within two days. Eddon was arrested and charged with murder in the first degree. Upon the trial he was found guilty of the crime of manslaughter and sentenced to ten years in the penitentiary. From this judgment he appeals to this court.

Various assignments of error are made, two of which we shall discuss. After the testimony of the defense had closed, and without the character of the deceased having been raised or put in question by the defense, the state, on rebuttal, offered evidence tending to establish the reputation of the deceased as a law abiding and peaceable man. It further offered evidence tending to show that Meyers was not in the habit of carrying deadly weapons. There are many authorities holding that it is not competent for the defense to prove the reputation of the deceased as a law abiding and peaceable man; but many others hold that where the question of self-defense is in issue, and where such testimony serves to explain the conduct of the deceased and is, therefore, a part of the *res gestæ*, he can show the bad character and reputation of the deceased as a turbulent, quarrelsome man; and the rule is universal, we think, that when this question is gone into by the defense, the state may rebut such testimony by showing his good character.

There is, unfortunately, no brief filed by the respondent in this case, but from the examination of the cases cited by the appellant, the text books on the subject, and all the information we have been able to gather, we think the universal rule is opposed to the doctrine that the prosecution on a trial for murder, in the first instance and as a part of

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their case, can show the character and reputation of the deceased; and if they cannot do this in the opening, much less should they be allowed to go into this question in rebuttal, after the defendant has closed his case.

In *State v. Potter*, 13 Kan. 414, that eminent jurist Judge BREWER, in discussing this proposition, says:

“In such cases it is said that the authorities hold that the defendant may show the bad character and reputation of the deceased as a turbulent, quarrelsome man. And if the defendant may show that the deceased was a known quarrelsome, dangerous man, why may not the state show that he was a known peaceable, quiet citizen? The argument is not good. The books are full of parallel cases. The accused may in some cases show his own good character. The state can never in the first instance show his bad character. A party can never offer evidence to support a witness' credibility until it is attacked. The reasons for these rules are obvious. Such testimony tends to distract the minds of the jury from the principal question, and should only be admitted when absolutely essential to the discovery of the truth. Again, the law presumes that a witness is honest, that a defendant has a good character, and that a party killed was a quiet and peaceable citizen, except so far as the contrary appears from the testimony in the case; and this presumption renders it unnecessary to offer any evidence in support thereof.”

It is evident that if the introduction of such testimony is unnecessary, it is liable to have a pernicious influence, as Judge BREWER says, by attracting the minds of the jury to the immaterial evidence and leading their minds from the true issues in the case.

In *Ben (a slave) v. State*, 37 Ala. 103, in deciding this question, the court says:

“It has been decided in this state, that the bad character of the deceased is competent evidence for the accused, where the circumstances are such that they would be illustrated by such character. The reason upon which that decision rests is, that the slayer must be reasonably presumed to

act upon the circumstances surrounding him, as they are colored by the bad character of the deceased; and that, therefore, it is but just to the accused that the jury should know that character. We do not think that this reasoning requires us to hold that the state may go into evidence of the peaceable character of the deceased when it is not assailed on the part of the accused. If the character of the deceased was that of a peaceable man, the circumstances may safely be left to speak their own language. It is not requisite to their interpretation that the character should be known."

Especially can it be seen that the testimony offered in this case to show that Meyers was a man of a peaceable character, and that he was a man who did not carry arms, and never had any fire arms in his possession, was exceedingly prejudicial to the defendant; for there was no attempt made to show that the defendant had any knowledge of Meyers' reputation as a peaceable man, or any knowledge of the fact that he was not in the habit of carrying fire arms; and the logical result of such testimony would be to hold Eddon responsible for acting on the theory that Meyers was the kind and character of a man proven to be, when there is nothing to justify the conclusion that he was aware of Meyers' character in this respect. In other words, the jury would judge Eddon's acts in the light of their knowledge of Meyers' character, instead of in the light of Eddon's knowledge of Meyers' character, in arriving at a conclusion whether or not Eddon was justified in concluding that he was in such danger of great bodily harm as to justify him in shooting him. Of course, the rule is, that he must act as a prudent man would be justified in acting under the circumstances; and to hold him responsible for circumstances of which he was not aware, is plainly an injustice.

"In a prosecution for homicide it is not competent for the prosecution to show the peaceable disposition or char-

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acter of the deceased, or his good reputation, except in rebuttal, when it has been assailed by the defense; for it is to be presumed, until otherwise shown, that the character, disposition or habits of the person killed had no influence upon the defendant in committing the homicide." Kerr, Homicide, § 420.

In *Pound v. State*, 43 Ga. 88, the court, in passing upon this question, says:

"When the State of Georgia charges the commission of crime against the citizen, it is incumbent on the state to prove the accusation and to rebut, by proper testimony, matters permitted to be given in evidence for the defense, but not, in the first instance, to repel the presumption of the defense before these are put in issue by proof."

To the same effect, *People v. Anderson*, 39 Cal. 704; *People v. Bezy*, 67 Cal. 223 (7 Pac. 643), and, in fact, as we before said, such is the universal holding of the courts where the question of character is allowed to be introduced at all.

The state also, over the objection of the defense, introduced the dying declaration of Meyers concerning the affray. The subject of dying declarations is a difficult one to adjudicate. The general doctrine is that the full belief in impending death is the true and only test of admissibility in evidence of such declarations. The trouble with this character of evidence is, that it is in its nature hearsay evidence and is in practical conflict with the constitutional right of the defendant to meet the witnesses, that testify against him, face to face; and is in conflict with his right to cross examine such witnesses; and it is only tolerated on the ground of necessity growing out of the fact that murderers, by putting the witnesses, who are generally sole witnesses of the crime, beyond the power of testifying by killing them, will escape the consequences of their crime. It can only be justified on the presumption that the solemn realization of impending and inevitable death will take the

place of the solemnity of an oath; and the greatest care and caution ought, therefore, to be exercised in the admission of this character of testimony.

The books are full of instances where dying declarations have been refused because it did not appear plainly that the person making the declaration was impressed with the fact that there was no hope of his recovery, or that he was not convinced of the near approach of death; while many others have been admitted under practically the same showing. So that it is difficult to obtain any satisfactory information from an investigation of the cases. But taking the general doctrine, held by all authorities, as a basis of admission, viz., the consciousness of immediately approaching death, we think the judge was justified in admitting the declaration, or at least a portion of the declaration, of Meyers proven in this case, though we think it came very near the border line of inadmissibility.

It is argued by appellant that this was a statement made to a newspaper reporter. This seems to be true from the testimony, but while that may affect to a certain extent its credibility, we think it does not necessarily exclude it, as it makes no particular difference, so far as eligibility of the declaration is concerned, to whom it is made. The doctor testifies that he had informed Meyers that the termination would be fatal, and Meyers replied that that was what he thought. It is evident from the circumstance of Meyers having sent for an attorney to draw up his will and to make arrangements for the settlement of his estate and the disposition of his property, that his mind was running upon his death, and that he was apprehensive that the dissolution was rapidly approaching, for he told the lawyer, just before the statement was made, that they had better hurry up the business concerning the will, for he did not know how long they might have to attend to it in. And without reviewing all the circumstances, we think we would

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not be justified in excluding this statement. Inasmuch as we desire to comment upon this statement in another branch of the law, we will set it out here:

“He said he was going out near Ritzville to see about some stock of some kind. He was on a horse, and in going by saw that the fence was down. (Objection.) Saw the fence was down and went back to see Mr. Carlton, a gentleman living on the place. That the fence was in a bad condition, and have him fix it. As he rode in the lane he thought he saw Mr. Eddon through an opening in the log stable. He asked Carlton if that was Eddon. He replied that it was; and he said to tell him (calling him a name) to come out there.

“*Mr. Griffiths*: Tell what the witness said. A. Said, ‘Tell the son-of-a-bitch to come out here. I want to see him.’ He stated that he came out of the stable and came towards him, and, as he came around before the stable, drew a gun and says, ‘Take that back.’ Mr. Meyers said, ‘Put it up,’ and he said, ‘Take it back;’ and Meyers said, ‘Put it up’ three times. Advanced to the fence and laid either his hand or the gun on the fence and shot him.”

“Q. Was that the substance of all that he told you of the occurrence? A. After he was shot he put his hand back and thought he could feel the bullet or something back — put his hand back to see what it was, and at that I believe he fell or settled to the ground. That after he had settled to the ground he called his hired man that was near by, and Mr. Carlton examined him to see if he was unarmed.”

This last portion of the statement we think was inadmissible, as it was no part of the *res geste*, and we do not think the statement of what he did after the shooting, which was in the nature of obtaining testimony that he was not armed at the time of the difficulty, should have been allowed under any authority as a part of the dying declaration; for the admission of dying declarations in cases of homicide is thus formulated by 1 Greenleaf, Evidence, §156: The death of the deceased is the subject of the charge, and the circumstances of the death are the subject

of the dying declarations. It seems to us that the portion of this statement in reference to calling witnesses to see whether or not Myers had any arms, after the affray had ceased, was no part of the circumstances of the death; and the same may be said of the first part of the statement, with reference to the reason for his going to the place where the difficulty occurred.

The instruction, and the whole instruction, of the court on the subject of dying declarations was as follows:

“Dying declarations as to the circumstances under which a mortal wound was received are admitted as evidence upon the theory that when the deceased made them he was in expectation of speedy dissolution or impending death, and that the solemnity of his situation impresses him as strongly with the necessity of strict truthfulness as he would be impressed by the obligation of a judicial oath, and that under these circumstances the temptation or inducement to falsehood is removed. In other words, his situation places him in law upon the same footing as though he had been sworn and had made his statement in the case, and his dying declarations are to have no greater weight than if the deceased were alive and testified to the same facts upon the witness stand. So that when the dying declarations are before the jury, as in this case, they are to be treated as the other evidence in the case, and to be considered with such evidence in determining the issues in the case. Like all of the evidence, the jury is to determine the weight which they shall have, and this the jury will give to the dying declarations from a full consideration of all the facts and circumstances surrounding them.”

To this instruction the defendant excepted. It is true that there is a line of authorities under which this instruction of the court could be sustained, but there is another line of authorities which hold that the dying declaration does not stand upon the same footing, and should not have the same weight as the testimony of a person who is sworn in the case. It is true that a dying declaration is made

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competent testimony, as we have before said, from necessity; but it seems to us that the most that can be said is that the solemn thought of impending death only takes the place of the solemn oath which is administered to a witness in court, and that no greater weight should be given to a dying declaration than that which would be given to sworn testimony when no opportunity was given for a cross-examination.

It is the experience of every court and every lawyer that cross-examination is the most powerful instrument known to the law in eliciting truth or in discovering error in statements made in chief, whether that error arise from mistaken judgment and careless observation and expression, or from a corrupt desire and intention to pervert the truth. The defendant is deprived of this aid, which the law guarantees to him in cases where witnesses testify in open court; and, notwithstanding the fact that the witness may believe that he is about to be ushered into eternity, yet observation teaches that even this solemn fact does not always disabuse a person's mind of his prejudices, or even eradicate a vindictive or revengeful feeling. Many persons have been known to die with the most bitter curses and imprecations on their lips; and even in this case it is testified by the witnesses who heard the last statement, that while Meyers was making his dying statement, when he referred to Eddon he applied to him the most opprobrious, disgraceful and insulting epithets; that he asked his wife to see that justice was done him, and that she told him that she would if she had to live on bread and water; showing conclusively that the spirit of reconciliation and forgiveness did not exist in the mind of the deceased at the time that he was making the statement, and that he was still somewhat influenced by feelings of revenge against his slayer.

From the further fact, that the testimony comes through

the medium of others, making another remove from testimony as given in court, the chances of misunderstanding just what was said, or intended to be said or meant, by the person making the statement, making allowance for lack of expression in the uttering of sentences, and the fact that a sentence uttered in one tone and with one expression may convey one meaning and in another tone and with another expression or gesture or look, would convey another and different meaning—it seems to us, taking all these things into consideration, that the instruction that the statement should receive the same weight as the statement of a witness under oath, is too broad, and is liable to work injustice to the defendant. And in this view we are sustained, we think, by the weight of modern authority. The rule is thus stated by Kerr on the Law of Homicide, § 415:

“The theory upon which dying declarations, being mere hearsay, are made admissible is that when an individual is in constant expectation of impending death, all temptation or inducement to falsehood is removed, and the solemnity of his situation is supposed to impress him as strongly with the necessity of strict truthfulness as the obligation of a judicial oath; but the circumstances attending and immediately surrounding the making of such declarations—the absence of all cross questioning, the presence, usually, of only friends and sympathizers, whose interest in the affair is identified with that of the deceased—together with the likelihood of feebleness of mind and misunderstanding, all create an element of uncertainty as to the proper weight of such declarations, which necessarily makes the degree of such weight a question of fact in each particular case; and it is error to instruct the jury that the credibility of the dying declarations is to be measured by the weight which the testimony of the declarant would have received had he been present and testified at the trial.”

In *State v. Mathes*, 90 Mo. 571 (2 S. W. 800), it was decided:

“An instruction, that dying declarations given in evidence on the part of the state are to be received with the

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same degree of credit as if testified to under oath on examination, is erroneous.”

“Dying declarations are in their nature secondary evidence, and are so regarded in the law. It is, therefore, error to instruct a jury to give them the same weight they would if the declarant had testified before them.” *State v. Vansant*, 80 Mo. 67.

In discussing this question the court in that case said:

“It is true that in some of the authorities the admissibility of dying declarations is put upon the ground that ‘the persons whose declarations are thus admitted are considered as standing in the same situation as if they were sworn, the danger of impending death being equivalent to the sanction of an oath.’ (Greenleaf, Ev., § 157.) It is to be remembered, however, in weighing such testimony that feelings of animosity and illwill once aroused are not always allayed, and that the passion of anger attending the fatal occurrence itself is not always extinguished even by the consciousness of impending death; and it is also to be remembered that the accused is deprived of all power of cross examination, ‘a power quite as essential to the eliciting of all the truth as the obligation of an oath can be.’ Besides such declarations are afflicted with the common infirmity which attaches to all oral statements or verbal admissions reduced to writing or repeated by another, and are liable to be colored or deflected by the medium through which they are transmitted to the jury.”

Mr. Wharton, in his work on Criminal Evidence, § 276, in discussing this subject, says:

“Yet, in dealing with this kind of evidence, one or two preliminary cautions should be observed. Passions and prejudices, which in life pervert the perceptive faculties, do not always lose their power on the death bed. . . . It should be remembered that cross examination, when a witness is produced in court, gives a process by which delusions can be dissipated. But no such process exists by the death bed. The witnesses who catch up these statements are generally friends of and sympathizers with the dying man, eager to encourage and preserve any remarks

he may drop, no matter how incoherent or feverish, which may vindicate him, or implicate a common object of hate; nor by such witnesses is it likely that questions would be asked as to the grounds of the declarant's belief. Nor can it always be said that the consciousness of the near approach of death is an equivalent to an oath administered on the witness stand. A witness sworn in court knows that he may be convicted of perjury if he testifies falsely. A dying man, if he believes in a future retribution, will speak, if his faculties are unimpaired, under a similar sanction; but all dying men do not retain their faculties unimpaired, nor do all dying men believe in a future state of retribution. Convicts on the scaffold have, as a class, as little hope of reprieve as any persons on the eve of death; yet there is no kind of evidence so unreliable as the last speeches of convicts on the scaffold. The weight, therefore, to be attached to dying declarations depend upon these conditions: (1) The trustworthiness of the reporters; (2) the capacity of the declarant at the time to remember accurately the past; and (3) his disposition truly to tell what he remembers."

It seems to us that under the circumstances of this case, and in fact under the circumstances of any case, the court ought to have, outside of the error of instructing the jury that the dying declaration should have the same weight as testimony under oath, called the attention of the jury more specifically to these matters spoken of by Mr. Wharton, which could attest the truthfulness of the statement.

The same doctrine announced above was held in *State v. McCanon*, 51 Mo. 160, and in *Lambeth v. State*, 23 Miss. 358, and is thus commented on in Rorer's *Crim. Ev.*, p. 38:

"With respect to the effect of dying declarations, it is to be observed that, although there may have been an utter abandonment of all hope of recovery, it will often happen that the particulars of the violence to which the deceased has spoken were likely to have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed. The consequences, also, of the violence may occasion an injury to the mind, and an

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indistinctness of memory as to the particular transaction. The deceased may have stated his inferences from facts, concerning which he may have drawn a wrong conclusion, or he may have omitted important particulars from not having his attention called to them. Such evidence, therefore, is liable to be very incomplete. He may naturally, also, be disposed to give a partial account of the occurrence, although possibly not influenced by animosity or ill-will. But it cannot be concealed that animosity and resentment are not unlikely to be felt in such a situation. The passion of anger once excited may not have been entirely extinguished, even when all hope of life is lost. . . .

“Such considerations show the necessity of caution in receiving impressions from accounts given by persons in a dying state; especially when it is considered that they cannot be subjected to the power of cross examination; a power quite as necessary for securing the truth as the religious obligation of an oath can be.”

In view of all these doubts which are practically raised as to the grounds of the statement made by the declarant, we think it is going too far to say that it should go to the jury with the same weight as the testimony of a sworn witness who can be subjected to a truth-eliciting cross examination; and that the logic of all the cases only leads us to the extent of declaring that the testimony should be received with the same weight as the testimony of witnesses who cannot be subjected to cross examination. That this is a circumstance which the jury have a right to take into consideration in weighing the testimony.

There is another assignment of error which raises a question of practice, or rather of procedure, which ought to be settled, to the end that a uniform practice may be adopted in the trial of criminal causes.

In selecting the jury, the court compelled the defendant, over his objection, to exercise two peremptory challenges to one by the state, until the peremptory challenges were exhausted. Sec. 348 of the Code of Procedure provides,

among other things relating to peremptory challenges, that the plaintiff may challenge one and the defendant may challenge one, and so, alternately, until the peremptory challenges shall be exhausted. This proceeding is found in the civil practice act. Sec. 1297 provides that the law relating to drawing, retaining and selecting jurors, and trials by jury in civil cases, shall be applied to criminal cases.

Our first impression was that this assignment was meritorious, and that the language of the statute was not susceptible of construction; but on further consideration it is plain that construction is absolutely necessary, for inasmuch as the defendant has twelve challenges and the state but six, there cannot be such a thing as alternate challenge of one on a side until the challenges are exhausted, for there comes a time before the exhaustion of the challenges when the alternation must of necessity cease; and the literal construction of this statute would have the effect of depriving the defendant of the last six challenges. The seeming inconsistency comes from the fact that the mode of challenge was enacted with reference to civil actions, on the supposition that the number of challenges were equal, and without reference to the excess of challenges allowed the defendant; and it is evident that this excess was not taken into consideration by the legislature when the law in relation to the selecting of jurors in civil actions was made applicable to criminal causes.

The different provisions of the law, then, being of doubtful meaning, and inconsistent, so far as their practical application is concerned, with themselves, we must construe all the acts together, looking at the spirit and reason of the law, and to the reasonable application of each act to the other, and give them that construction, if possible, which will render all the different provisions harmonious and operative. To do this, it must be confessed that a

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seeming violence is done to some of the words used in § 348, and if that section were to be construed alone, it would be an *actual* violence. But in consideration of all the different sections, we think each should receive, if fairly susceptible of it, such a construction as would carry out a reasonable intention on the part of the legislature. Therefore, the conclusion we reach, from a consideration of all the dependent acts, is, that the legislature only intended to give the defendant twice the number of challenges that were given to the state, to be exercised alternately in proportion to the number of challenges respectively given; and that it did not intend to give the defendant the additional advantage of having seven peremptory challenges left after the state had exhausted all its challenges; a result which it seems to us would unfairly imperil the rights of the state and cripple courts in administering the laws.

Many other errors are assigned, but we think they are not sufficient to warrant a reversal of the judgment. But for the errors above discussed, the judgment will be reversed and the cause remanded to the lower court with instructions to grant a new trial.

STILES and ANDERS, JJ., concur.

HOTT, J. (*dissenting*).—I think the testimony taken altogether so clearly established the fact that the defendant was guilty of manslaughter, that the jury could not have found otherwise than as they did. For this reason the judgment should not be reversed even although it appeared that some technical error had been committed by the court during the progress of the trial. Such being the case, I do not think it necessary to discuss the argument and conclusion of the majority of the court as to many of the questions decided.

There is one, however, as to which I wish to say a word,

and that is as to the right of the prosecution to introduce evidence as to the good character of the deceased by way of rebuttal, when the good character of the defendant has been testified to by witnesses introduced on his behalf. I am aware that the weight of authority is with the position taken by the majority, but I cannot yield my assent to the doctrine announced by them. Under the rules which obtain as to the trial of criminal actions in modern times some of the old fictions in relation to the rights of the defendant must be discarded, or the failure of justice will be such as to bring disgrace upon the administration of the law. At the time most of these technical rules were established the defendant was practically at the mercy of the court, and it was right that he should be protected in every way possible; but at this time the defendant goes to trial under entirely different circumstances, and there is no reason why the rules relating to such trials should not be substantially the same as those obtaining in civil cases, excepting that to avoid the possibility of an innocent man being convicted the guilt of a defendant should be made to appear beyond a reasonable doubt before a verdict should be rendered against him.

When, as in the case at bar, the killing by the defendant is admitted, and the plea of self-defense interposed, the jury should be put in possession of every fact surrounding the transaction, and if the character of the defendant is allowed to go before them as a part thereof, fairness and reason require that they should also be informed as to the character of the deceased. The important and frequently the only question which they have to decide in such a case is, as to which of the parties was the aggressor in the affray. If in fact the defendant was the aggressor, he should under ordinary circumstances be found guilty at least of manslaughter, and if the deceased party was the aggressor, the jury would generally be justified in acquitting the defendant.

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The important question to be determined is, as to which of the two persons engaged in the affray was the aggressor. And if the jury are to be aided by having the good character of one of the parties to such affray put in evidence, fairness to the public requires that they should be further aided by being informed as to the good character of the other party. And as evidence of the good character of the defendant is admitted without proof of any knowledge in regard thereto by the deceased party, no such proof should be required to make competent like evidence as to his good character. In my opinion the judgment should be affirmed.

SCOTT, J., concurs.

[No. 1126. Decided February 23, 1894.]

*SARAH A. ROBINSON, Appellant, v. ANNIE C. HALLER
et al., Respondents.*

ACTION BY NON-RESIDENT—SECURITY FOR COSTS.

Where an action is instituted against several defendants by a non-resident plaintiff, he cannot, under Code Proc., § 844, be compelled to furnish a separate bond for costs to each defendant appearing and claiming such bond.

Appeal from Superior Court, King County.

H. R. Clise (George H. King, of counsel), for appellant.

Burke, Shepard & Woods, for respondents.

The opinion of the court was delivered by

DUNBAR, C. J.—This is an action by a non-resident plaintiff claiming title to an undivided half interest in a tract of

land in the city of Seattle, against thirty-five defendants, eighteen of whom appeared separately, each filing a motion for security for costs, which several motions the court granted, requiring a separate bond running to each defendant. The plaintiff filed one bond in the sum of \$200. Upon the refusal to file a bond in favor of each separate defendant, on motion of the defendants, the court dismissed the action. So that the question to be decided is, can a non-resident plaintiff, where the action is against several defendants, be compelled to furnish a separate bond for costs to each defendant appearing and claiming such bond?

We think the action of the court in requiring these additional bonds and dismissing the action for non-compliance with said order is plainly erroneous. Sec. 844 of the Code of Procedure, which is the only law authorizing security for costs in case of a non-resident plaintiff, provides that, when a plaintiff in an action resides out of the county, or is a foreign corporation, security for the costs and charges which may be awarded against such plaintiff may be required by the defendant. When required, all proceedings in the action shall be stayed until a bond executed by two or more persons be filed with the clerk, conditioned that they will pay such costs and charges as may be awarded against the plaintiff by judgment or in the progress of the action, not exceeding the sum of \$200.

We think a fair construction of this statute will lead to the conclusion that but one bond is contemplated in any one action, without regard to the number of defendants in that action. It is urged by the respondents that in cases where there are numerous defendants, the costs would in all probability aggregate a sum far in excess of \$200; and that, therefore, a single bond would not be a sufficient protection. But to meet this contingency the same section of the statute provides that a new or additional bond may be ordered by the court or judge upon proof that the original

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bond is insufficient security, and proceedings in the action stayed until such new or additional bond be executed and filed.

It seems to us that there is hardly room for construction of this statute. Notwithstanding the number of defendants it is but one action, and it is not the policy of the law to make a requirement so oppressive as to virtually exclude the bringing of actions of this kind, which might easily be the result in this case. It might as well be concluded that appeal bonds, which are required by the statute, should be given to each respondent in the action, because a judgment in the appellate court might be reversed as to some of the respondents and affirmed as to others. The same logic would also authorize a separate attorney's fee. Such was evidently not the intention of the statute.

It is further urged by the respondents that, even if the *court* below erred in requiring the plaintiff to file a separate *bond* in favor of each defendant moving, the judgment of the *court* can be sustained because the bond given was not the *bond* required by statute, but a mere undertaking lacking the technical form and requisites of a bond. But if *such is* the case, the respondents should have moved against the *bond* in the manner required by the statute.

An investigation of the whole record leads us to the conclusion that the judgment must be reversed for the errors alleged, and it is so ordered.

STILES, SCOTT, ANDERS and HORT, JJ., concur.

[No. 1145. Decided February 23, 1894.]

JAMES DIGNAN, *Respondent*, v. WILLIAM H. MOORE AND
ELLEN A. MOORE, *Appellants*.

MORTGAGES—DEED ABSOLUTE ON ITS FACE—OPTION TO GRANTOR
TO REPURCHASE.

A deed absolute on its face will not be construed as a mortgage, although a separate writing in the nature of an option contract was executed at the same time by the grantee agreeing to reconvey upon certain conditions, when it appears that the grantee declined to make a loan upon the property, and that, upon the importunity of the grantors, he agreed to purchase their equity of redemption, which they were about to lose under an incumbrance already upon the property, and further, that the parties were dealing upon equal terms and the consideration was not grossly inadequate.

Appeal from Superior Court, King County.

Action by James Dignan against William H. and Ellen A. Moore to quiet title to block 6 of Lake Dell Addition to the city of Seattle. On August 8, 1891, the defendant William H. Moore applied to the plaintiff for a loan of money on the property. The plaintiff refused to loan on the property because it was incumbered. Afterward Mr. Moore offered to take \$1,500 for his equity in the property, provided he was given a six months' option for its purchase. Plaintiff said he would submit his proposition to his counsel, Mr. Winsor, "and if Mr. Winsor says the title is all right and I can give you an option for six months in writing so that afterwards you cannot claim it is a mortgage, I will buy your property." That the two parties laid the proposition before Mr. Winsor, who said: "Yes, I can draw up that kind of an agreement, provided Mr. Moore won't perjure himself six months later." Mr. Moore answered: "I understand, and I will deed you this property absolutely, taking an option, and if I don't buy in six months the property is yours." Thereupon the

8	312
12	63
12	249
8	312
137	304
37	306
138	46

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Argument of Counsel.

land was deeded to plaintiff by the defendants, and the following agreement was signed by both parties, viz.:

"James Dignan, of Seattle, hereby agrees to sell to W. H. Moore, of the same place, block six (6) of Lake Dell addition to the city of Seattle, King county, State of Washington, and to convey the same to him by deed containing covenants against my own acts only, upon his paying to me, on or before six months from this date, the sum of fifteen hundred dollars, with interest thereon at $1\frac{1}{2}$ per cent. per month, together with all sums of money which I shall hereafter pay upon claims against the said property for county or city taxes, or for grade or other special taxes, or upon any other lien or incumbrance by mortgage thereon or otherwise, with interest thereon at $1\frac{1}{2}$ per cent. per month, on or before six months from this date.

"It is expressly understood that this agreement is an option to purchase, and not an instrument of defeasance, and that time is of the very essence of this agreement. That no partial payment can be made hereon, and that at the expiration of six months this instrument shall terminate and be void as against James Dignan, his heirs and assigns.

"That the said Moore signs this instrument for the purpose of expressly assenting to the absolute termination of all his rights under the same at the expiration of said six months upon default of his making the payments herein provided for."

From a decree quieting title in plaintiff, the defendants appeal.

Preston, Carr & Preston, and *W. R. Bell*, for appellants:

A deed absolute on its face, and a separate agreement by the grantee for reconveyance of the same tract of land to the grantor upon payment of the consideration named in the deed, with interest, taxes, etc., by a specified time, bearing same date as the deed, constitute together a mortgage. *Wilson v. Drumrite*, 21 Mo. 325; *Kelley v. Leachman*, 29 Pac. 849; *Brinkman v. Jones*, 44 Wis. 498; *Ewart v. Walling*, 42 Ill. 453; *Preschbaker v. Feaman*, 32 Ill. 476;

Sharkey v. Sharkey, 47 Mo. 543; *Benton v. Nicoll*, 24 Minn. 221; *Brush v. Peterson*, 6 N. W. 287; 1 Jones, Mortgages, § 250; *Murphy v. Calley*, 83 Mass. 107. A court of equity will construe the conveyance to be a mortgage, whatever may be the form of the contract, if the person to whom the application for the loan is made agrees to receive back his money with legal interest, or a larger amount within a specified time thereafter, and to reconvey the property. *Holmes v. Grant*, 8 Paige Ch. 243; *Brown v. Dewey*, 1 Sandf. Ch. 56; *Dennison v. Ely*, 1 Barb. 626; *Sears v. Dixon*, 33 Cal. 326.

Winsor, Bush & Morris, for respondent:

“The covenant or agreement to reconvey is not necessarily either at law or in equity a defeasance. And express provision that the contract for reconveyance should be regarded only as a contract to reconvey and not as an acknowledgment that the deed was intended as a mortgage, should be given effect to, if consistent with the whole transaction, as declaring the intention of the parties that it should not create a mortgage.” 1 Jones, Mortgages, §§ 260, 261; *Glendenning v. Johnston*, 33 Wis. 351; *Henley v. Hoteling*, 41 Cal. 26; *Manasse v. Dinkelspiel*, 68 Cal. 405; *Page v. Vilhac*, 42 Cal. 85; *Farmer v. Grose*, 42 Cal. 173; *Richardson v. Hardwick*, 106 U. S. 252. The criterion, whether a deed absolute on its face amounts to a mortgage, as established by the courts, is, “the continued existence of a debt or liability between the parties, so that the conveyance is in reality intended as a security for the debt, or indemnity against the liability. On the contrary, if no such relation whatsoever of debtor and creditor is left subsisting, then the transaction is not a mortgage, but a mere sale and contract of repurchase.” 3 Pomeroy, Eq. Jur., § 1195; *Turner v. Kerr*, 44 Mo. 432; *Price v. Karnes*, 59 Ill. 278; *McNamara v. Culver*, 22 Kan. 661; *Macaulay*

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v. Porter, 71 N. Y. 177; *Albany, etc., Canal Co. v. Crawford*, 11 Or. 248; *Reed v. Bond*, 55 N. W. 619; *Conway's Ex'rs v. Alexander*, 7 Cranch, 237. Under the agreement all that Moore received was an option to purchase the lands in question. This was neither a sale nor an agreement to sell. The owner parts with his right to sell the lands for a limited period. The other party receives the right to elect to buy. See *Ide v. Leiser*, 10 Mont. 5. The option in the contract construed by this court in the case of *Drown v. Ingels*, 3 Wash. 424, is like that in this case. Similar contracts are construed as options in the following cases: *Horbach v. Hill*, 112 U. S. 144; *Dwyer v. Raborn*, 6 Wash. 213; *Chadbourne v. Stockton Savings & Loan Society*, 88 Cal. 636; *Loveland v. Fisk*, 32 Pac. 278; *Richardson v. Hardwick*, 106 U. S. 252; *Cunningham v. Duncan*, 4 Wash. 516; *Hill v. Grant*, 46 N. Y. 499.

The opinion of the court was delivered by

Hoyt, J.—We deem it unnecessary to enter into a discussion of the questions of law presented in the briefs of counsel, for the reason that, conceding the law to be as claimed by appellants, the facts shown by the record will not justify their contention founded thereon. The most that appellants claim is that a deed, absolute on its face, will be held to be a mortgage when in fact it was so intended by the parties thereto, or when it was given as security for the payment of money.

The undisputed proofs in this case show that the deed under which respondent claims was not given under circumstances which make either of these reasons for holding it to be a mortgage applicable. It appears from such proofs that the respondent absolutely declined to make a loan upon the property which was afterwards deeded to him. Such property was incumbered, and the grantors in the deed were about to lose their right of redemption.

Under these circumstances, after much importunity on the part of the appellants, the respondent agreed to purchase their equity of redemption.

There is nothing whatever to show that he agreed to take it by way of security, or that it was understood between the parties that the money advanced by respondent was in the nature of a loan. It is true that it appeared by a separate writing that respondent agreed to reconvey the property to the appellants upon certain conditions, but there is nothing in the testimony to show that it was intended that the execution of this paper was to have any effect whatever in the construction of the deed. Instead thereof, directly the contrary is made to appear. If we should sustain the contention of the appellants, under the facts disclosed by this record, it would be in effect to hold that two persons standing upon an equal basis are incompetent to make a contract by which one of them shall sell to the other real estate, and make a deed thereto which shall be absolute as between the parties, and at the same time agree that the grantor in said deed shall have the right to repurchase the property sold. We are not prepared so to restrict the power of competent persons to control their property and contract in regard thereto. If it appeared in the case that any unfair advantage had been taken by the grantee in the deed, that he had obtained the property for a grossly inadequate price, or that the rights of third parties were affected, a court of equity could doubtless interfere. But there is nothing of the kind shown by this record. The parties were dealing on equal terms, and the consideration was as large as under all the circumstances of the case could have been reasonably expected.

The judgment appealed from must be affirmed.

DUNBAR, C. J., and SCOTT, STILES and ANDERS, JJ.,
concur.

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[No. 1182. Decided February 23, 1894.]

CITY OF SPOKANE, *Appellant*, v. J. J. BROWNE AND
ANNA W. BROWNE, *Respondents*.

8	317
28	648
8	317
40	149

MUNICIPAL CORPORATIONS—ASSESSMENT FOR STREET IMPROVEMENT—CHANGE OF METHOD—RIGHTS OF CITY AND ABUTTING OWNERS—DESCRIPTION OF IMPROVEMENTS.

Although a street improvement has been initiated by a city under a law providing for assessment therefor according to valuation of property in the assessment district, and, during the progress of the improvement, the law has been changed so as to provide for assessment per front foot of the abutting property, yet the assessment under the scheme subsequently adopted will be valid and binding, provided the property owners are not thereby called upon to pay any greater amount of money nor to make any earlier payment than was required under the law in force at the time of beginning the improvement.

Where the contract for a street improvement was let and the work partly done before the adoption of a new city charter, which changed the method of assessment, such repeal would not affect the right of the city to enforce its equitable right to reimbursement by the property owner for the obligations incurred by the city under its contract for such improvement. (*Wilson v. Seattle*, 2 Wash. 543, distinguished.)

Proceedings for a street improvement are not void because the ordinance provides for grading the street from the Seattle, Lake Shore & Eastern Railway to the south line of Buckeye street, and the assessment roll describes the work as done from the Union Pacific Railway to the Fair Grounds, when it is shown that such boundary lines are in fact identical.

Where an ordinance provides that a certain street be "graded," it is sufficient to authorize improvements consisting of "grading, grubbing, guttering and curbing" the street.

Appeal from Superior Court, Spokane County.

James Dawson, and *Jones, Belt & Quinn*, for appellant.

R. B. Blake, and *Frank T. Post*, for respondents.

The opinion of the court was delivered by

SCOTT, J.—Respondents were owners of certain lands within a district created by the city council of the city of

Spokane under its 1885 charter, for the purpose of levying an assessment to pay for certain street improvements. Said improvements were provided for and directed by an ordinance passed under said charter, and work was commenced thereon, but the improvements were not completed until after the adoption of the freeholders' charter on March 24, 1891. The ordinance directing the improvement, and under which the work was performed, provided for an assessment on the lands within the district according to value. After the adoption of the freeholders' charter and the completion of the work, this scheme of assessment was abandoned, and a levy per foot front on the lands abutting on the street to pay for such improvements was made. The respondents refused to pay such assessment on the lands owned by them abutting upon the street which was improved, and this suit was brought in equity to enforce a lien therefor against the same. A trial was had and a judgment was rendered in favor of the respondents, and the city has appealed.

The respondents contend that the city had no right to change the method of assessing the expenses for such improvements from the plan according to valuation to the later one of per foot front, and that the city should have pursued the original plan under which the work was ordered.

It is contended that at the time the work was directed under the previous charter, improvements of this sort could not be made except upon petition of property holders or by a given vote of the council, and that the improvements in question were instituted and occasioned by and in pursuance of a petition from such property holders, or some of them, owning lands in the vicinity. Furthermore, that a right of protest was given to such property owners, and the right to appear before the council to object to the proceedings at certain stages. It is contended that such prop-

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erty owners had a vested right to have the assessment levied according to the provisions of the ordinance under which the work was done. A number of cases have been cited by respondents as sustaining this contention. In *Cincinnati v. Seasongood*, 46 Ohio St. 296 (21 N. E. 630), it was held that the city should be governed in making the assessment by the law in force at the time of the passage of the improvement ordinance. This was a suit brought by the city against a property owner to enforce an assessment. In *Houston v. McKenna*, 22 Cal. 550, which was an action by a contractor against a property owner, it was held that the law relating to assessments in force at the time the contract was entered into became a part of the contract, which neither the legislature nor the city had a right to change thereafter.

In our opinion, however, the cases cited by the respondents fail to sustain their contention in this case. What was such vested right? Not that the assessment should be collected in any particular manner, so far as property owners were concerned, but rather that they should not be called upon to pay in excess of a certain sum. It does not appear in this case that the respondents have been in anywise injured, or that they have been called upon to pay in this action or by this levy any greater sum than they would have been required to pay in the original scheme of assessing according to valuation. Nor does it appear that they have been asked or required to make any earlier payment. In our opinion, in order for them to attack the assessment it must appear that it has worked to their injury. Otherwise they have no right to complain, for the manner of making the assessment and collecting the same is otherwise of no consequence to them. Elliott, Roads and Streets, p. 379.

It is contended by appellant that these authorities cited by respondents do not sustain their contention with regard

to having any vested right in the premises, on the ground that under the provisions of the law involved in the case of *Cincinnati v. Seasingood* aforesaid, the city was authorized to collect the expenses of such improvements in any one of three ways—according to the benefits to the contiguous property assessed, or according to the value of the property assessed, or by the foot front of the property abutting upon the improvement—but was required to determine under which method the improvement should be made before entering upon the same. While the Spokane charter contained no such provision.

We are unable to see, however, how this fact detracts from the force of this case as authority in the premises. The fact that the city was called upon to determine in advance which method it would pursue does not materially affect the principle decided, which was, in effect, that the scheme could not be subsequently changed to the injury of the property owner. We are disposed to follow that rule in this case, and we are of the opinion that the respondents' claim, that they have a vested right in the scheme first adopted, must be sustained; but with the qualification that such vested right was not in the manner of making the assessment, nor of collecting it, but only in the amount which they should be called upon to pay, and possibly in the time of payment, and if they were not called upon to pay any more money, nor to make any earlier payment under the scheme subsequently adopted, they suffered no injury in the premises and cannot be heard to complain.

It is further contended upon the part of the city that the effect of the adoption of the freeholders' charter was to repeal the prior laws under the previous charter authorizing the levy according to valuation to collect the expenses of such improvements. *Wilson v. Seattle*, 2 Wash. 543 (27 Pac. 474), is cited as supporting this proposition, and that

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the assessment could only have been made under the provisions of the new charter. But that case was based upon an essentially different state of facts. The record did not show that any work had been done or any contract therefor entered into at the time the council attempted to levy the assessment, and prior to this time the law had been changed by the adoption of the new charter. The owner was contesting the *assessment* on the ground that he had never had, and could not have, an opportunity to be heard, as under the new charter his property would be sold without suit, and at that time no liability had been incurred by the city. But in the case now before us, where the contract was let and the work partly done before the new charter was adopted, the city had incurred obligations under its contract, and an equitable right to be reimbursed by the property owner had accrued to it, measured by its liability in proportion to the value of each owner's property. This equitable claim it has a right to enforce, as it is doing, by suit in which the owners are heard, and, if they suffer no damage by the changed method of assessment, it makes no difference upon what basis the assessment is calculated.

The respondents further contend that said proceedings were void on the ground that there was no sufficient description of the improvement contained in the ordinance under which the work was done; that by § 7 of the 1885-6 charter (Laws, p. 302), the city had power to curb, pave, grade, plank, macadamize and gutter its streets and levy assessments upon the adjoining property for payment of the expenses thereof. The first section of the ordinance directing this particular improvement provides that Washington street shall be graded at the expense of the adjacent property, and this is the only description of the work contained in the ordinance. And they further object that the assessment roll introduced in evidence does not correspond in its description of Washington street with the part of

said street described in the improvement ordinance. In the ordinance it is provided that Washington street should be graded from the Seattle, Lake Shore & Eastern Railway to the south line of Buckeye street, while the property included in the assessment is all that property abutting on Washington street from the Union Pacific Railway to the fair grounds. These objections are untenable, for we think the character of the improvements made, viz., "grading, grubbing, guttering and curbing Washington street," was sufficiently described by the use of the word "graded" in the ordinance, and it sufficiently appears that the Seattle, Lake Shore & Eastern Railroad and the Union Pacific Railroad as it crosses Washington street are identical, and the same is true of the south line of Buckeye street and the fair grounds.

A further objection relates to a seeming discrepancy between certain sections of the new charter relating to street improvements, one of which seems to contemplate that ordinances shall be passed prescribing the mode of assessing therefor, and none such were passed. A complete scheme, however, is provided by other sections of the charter, and we think the people had power to include these regulations in the charter for this purpose; but we do not wish to be understood as sanctioning the provision purporting to bar property owners from contesting such proceedings in the courts.

The judgment of the superior court is reversed, and the cause remanded with instructions to enter a judgment in favor of the appellant for the amount claimed.

DUNBAR, C. J., and ANDERS and STILES, JJ., concur.

HOYT, J., concurs in the result.

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Opinion of the Court—Hoyt, J.

[No. 1228. Decided February 27, 1894.]

In the Matter of the Estate of H. C. Clement, deceased:
CHARLES S. HINCHMAN, *Respondent*, v. MARY J. CLEMENT, *Executrix*, AND FIDELITY TRUST COMPANY, *Executor*, *Appellants*.

DECEDENT'S ESTATE—SALE TO PAY MORTGAGE DEBT—ATTORNEY FEES.

The provision of § 1035, Code Proc., allowing the sale of a decedent's mortgaged property for the purpose of satisfying the mortgage debt, if the decedent "shall not have devised the same," merely limits the sale in case of a specific devise, and has no application to cases where the property has been devised to a residuary legatee. (DUNBAR, C. J., dissents.)

In ordering a sale of a decedent's mortgaged real estate to pay the mortgage thereon, under Code Proc., § 1035, it is error for the court to award an attorney's fee as upon foreclosure to the holder of the mortgage.

Appeal from Superior Court, Pierce County.

Doolittle & Fogg, for appellants.

Seymour, Stevens & Sharpstein, for respondent.

The opinion of the court was delivered by

Hoyt, J.—Respondent was the holder of a mortgage upon certain real property belonging to the estate of Horatio C. Clement, deceased. He filed his petition to have the property redeemed by the executors of the estate, as provided in § 1035 of the Code of Procedure. A hearing upon such petition was regularly had, and under the provisions of that section and §§ 1036 and 1037, the court, having determined that it was not for the best interest of the estate that the executors should redeem with the proceeds of other property of the estate, made an order that the property be sold under the provisions of said § 1037. To reverse such order this appeal has been prosecuted. It

is alleged that the court erred: (1) In finding the property not to have been specifically devised; (2) in ordering the sale of the property, the same having been willed to a devisee; and (3) in allowing an attorney's fee as for suit brought to collect the note and mortgage.

It will be seen that, excepting as to the question of the attorney's fee, the only reason given by the appellants for the reversal of the order is, that the property having been specifically devised by the deceased, the proceedings in reference thereto were not authorized by the statute under which they were instituted. As to whether or not it was so devised must depend upon the construction to be given to the language used in said § 1035. This section provides that, "if any person die, having mortgaged any real or personal estate, and shall not have devised the same, or provided for the redemption thereof by will, the court, upon the application of any person," etc.

The contention of the appellants is, that the property upon which respondent's mortgage rested had been devised within the meaning of this section, and that for that reason the making of the order was erroneous. The will of the deceased party made certain specific devises not covering the property in question, and then bequeathed unto his wife Mary J. Clement for her sole use and benefit the entire residue of his estate to do with as she saw fit, and bequeath to whomsoever she should desire. The property in question was covered by the clause which made the wife the residuary legatee. Did this constitute a devise of it within the meaning of the section under consideration?

The only reason that we can see why the legislature should make any distinction between property devised and that not so devised is, that in the first case the property would, upon being redeemed from the mortgage, pass to the devisee, while in the latter it would become a part of the body of the estate. In the first named case the prop-

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erty could not be sold to pay debts if there was property not so devised available for that purpose, while in the latter it could be so sold. And the same rule would apply as between property specifically devised and that which would pass by the terms of the will to the residuary legatee. That specifically devised would have to be kept intact even although the condition of the estate required all the other property to be sold for the payment of debts. If the property had been specifically devised it would not become a part of the body of the estate upon payment of the mortgage, but would pass to the devisee discharged therefrom. If, however, it was covered only by a residuary clause, it would be liable to sale for the purposes of administration regardless of the question as to the amount of other property.

From this it will be seen that unless the property has been so specifically devised as to take it out of the body of the estate, so that the devisee thereof, and not the estate in general, will get the benefit of the payment of the mortgage, there is no reason why the provisions of said section should not have force. Under the provisions of the will this property was not so devised. Upon the payment of the mortgage it would go to swell the body of the estate. It would be first subject to the payment of the debts, and then pass to the residuary legatee. It is no doubt true that for certain purposes a residuary devise may be treated as special, but for the purposes of this proceeding there is no reason why the residuary legatee should be held to occupy a different relation to the property than would an heir. She is simply entitled to that portion of the estate which shall be left after all its obligations have been discharged, and that is what would pass to the heir if there had been no will. Enough appears from the provisions of these sections to show that it was not the intent of the legislature to make them applicable only to intestate es-

tates, and if they should be applied at all where there is a will, there is no reason why they should not apply in such cases as the one under consideration.

Beside, the language of the section is, that the statute shall apply unless the property has been devised, and even without any aid to the construction of the language used it would be reasonable to hold that the property was not devised within the meaning thereof, unless it was specifically by description set apart. The legislature, by the use of such language, may well be held to have intended thereby to provide that the property as such shall have been specifically described in order to exempt it from the force of the section. And when we interpret the language in the light of the other provisions of the statute, and of the evident object of the legislation, it seems clear that such should be its construction. There is no reason for the application of the statute to an estate the body of which will pass to the heir which does not exist when it is to pass to the residuary devisee.

In our opinion, the lower court correctly construed the statute, and there was no error in its action in ordering the property sold to pay the mortgage. As a part of such order, the court provided that in addition to the amount due upon the mortgage there should be paid to the holder thereof an attorney's fee as upon foreclosure. In so doing we think it committed error. One of the main objects of the statute was to avoid the expense incident to foreclosure. The proceeding was not a suit to collect the debt within the contemplation of the contracting parties.

The order awarding the sale of the property will be affirmed, except that it will be so modified as not to authorize the payment to the respondent of the attorney's fee. Neither party will recover costs upon the appeal.

STILES, ANDERS and SCOTT, JJ., concur.

DUNBAR, C. J. (*dissenting*).—I agree with the majority in the disposition of the order granting the attorney's fee; but not in the construction of § 1035. In fact I do not think the language of the statute is susceptible of construction. The argument of the majority might be a proper one to present to the legislature; but inasmuch as that body has seen fit to limit the application of this remedy to property not devised, I am not inclined to amend the act by construction, which can only be done by interpolating the word "specifically" before the word "devised."

[No. 972. Decided February 28, 1894.]

G. W. FISCHER *et al.*, *Respondents*, v. JAMES M. QUIGLEY *et al.*, *Defendants*, JAMES GILL AND TIMOTHY RYAN, *Appellants*.

APPEAL—WEIGHT OF EVIDENCE—ACTION ON CONTRACTOR'S BOND
—PRIOR JUDGMENT AGAINST PRINCIPAL.

The findings and judgment of the lower court in an action at law tried by the court will not be disturbed on appeal, where the record discloses a sharp conflict in the evidence, unless there appears to be a decided preponderance of the evidence against the court's finding.

An action on the bond of a contractor, given under the provisions of Gen. Stat., § 2415, for the protection of those furnishing the contractor goods while engaged in making street improvements, is not barred by the procuring of a judgment against the contractor personally prior to the institution of suit upon his bond.

Appeal from Superior Court, King County.

Thompson, Edsen & Humphries, for appellants.

Allen & Powell, for respondents.

The opinion of the court was delivered by

ANDERS, J. — James M. Quigley and Patrick Quigley as principals, and the other defendants as sureties, executed a bond in accordance with § 2415, Gen. Stat., for the faithful performance of a contract to grade Stewart street, in the city of Seattle, previously entered into by said Quigleys with said city. The Quigleys, the contractors, after the grading of said street was completed, were sued by the plaintiffs Fischer & McDonald for merchandise sold and delivered to them, and a judgment was obtained against them for the amount claimed. To that action the appellants were not parties. In the present action the same plaintiffs sue upon the bond, alleging that they have been unable to collect their judgment against the Quigleys on execution, and aver that the claim upon which that judgment was rendered was for merchandise sold to the Quigleys as contractors upon Stewart street, and for the purpose of being used for the maintenance of the men employed by them in grading said street.

The cause was tried by the court without a jury, and the only question submitted for the determination of the court was whether the sale of the merchandise by the plaintiffs to the defendants Quigley was or was not with the understanding that the merchandise so sold was to be used upon the Stewart street grading contract. The court found as a fact that the merchandise was sold to be used upon the contract, as alleged by the plaintiffs, and accordingly rendered judgment against the defendants for the amount found due. The sureties have appealed from the judgment of the court, and the main question for our consideration presented in the record is whether the evidence is sufficient to sustain the finding and judgment.

The record discloses that there was a sharp conflict in the evidence, and this being an action at law, and the find-

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ings of the court being equivalent to the verdict of a jury, this court would not be justified in disturbing the findings and judgment unless the record shows a decided preponderance of the evidence against the court's finding, which we think it does not. *Yesler v. Hochstettler*, 4 Wash. 351 (30 Pac. 398); *Graves v. Griffith Realty, etc., Co.*, 3 Wash. 742 (29 Pac. 344). As the court below saw and heard the witnesses, it was better prepared to judge of their credibility than this court. Its conclusions will, therefore, not be disturbed.

The contention of the appellants that the judgment against the Quigleys personally is a bar to this action is not tenable. The appellants cannot complain that the respondents exhausted their remedy against the principals in the bond before attempting to collect the amount due from the sureties. The suit against the Quigleys was not an action upon the bond, and, therefore, cannot affect the rights of the plaintiffs in this action. *Brandt, Suretyship* (2d ed.), § 391.

The question of the validity of, or the necessity for, the bond sued on was not raised in the court below nor in the brief of counsel, and will not, therefore, be considered here for the first time on the argument.

The judgment is affirmed.

DUNBAR, C. J., and SCOTT and STILES, JJ., concur.

HOYT, J., dissents.

[No. 1057. Decided February 23, 1894.]

In the Matter of the Guardianship of the Infant Heirs of Ellen K. Hill, deceased: ELIZA MAUD HILL, Respondent, v. EBEN SMITH, Guardian, etc., Appellant.

GUARDIAN AND WARD—COMMINGLING OF FUNDS OF MINOR'S AND DECEDENT'S ESTATES—PRESUMPTIONS—RIGHT OF HEIR TO INSURANCE MONEY.

Where an insurance policy is made payable to the children of deceased, the money collected thereon is no part of decedent's estate, but goes directly to the heirs.

Where a guardian, who is also one of the executors of the estate of his wards' deceased father, allows the funds belonging to his wards to become commingled with the funds of the testator's estate, and his accounts as guardian to become confused with the accounts of the executors, the court is warranted in finding that the minor heirs had been supported from the funds of the estate, and that insurance money collected by the guardian had been kept intact for the use of the wards.

Appeal from Superior Court, King County.

Hughes, Hastings & Stedman, and Thomas T. Littell, for appellant.

Hays & Humphrey, and A. W. Hastie, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—From a close inspection of the record in this case we are unable to conclude that the findings and judgment of the lower court are not warranted by the testimony. It is scarcely worth while to cite authorities to sustain the proposition that the insurance money collected by the guardian is no part of the estate, for the law is well settled in this respect. This money goes direct to the heirs. The executors of the estate should have nothing to do with it, and it is the duty of the guardian into whose possession it comes to deliver it to the heirs as they

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become of age. Therefore, the petitioner in this case was entitled, on reaching her majority, to one-fourth of the insurance money in the hands of the guardian, and this, with interest on the same from the date of its receipt by the guardian, was all she was allowed by the decree of the court.

It is contended by the appellant that there was not sufficient available funds of the estate to support the minor children, and that it therefore became necessary to use this insurance fund for that purpose; but the report of the guardian does not clearly show this state of facts. On the other hand it shows that he has allowed this fund to become commingled and confused with the funds of the estate, and his accounts as guardian to become commingled and confused with the accounts of the executors, so that it was impossible for the court to determine what funds the expenses of supporting the children were paid out of. And in the absence of such clear and satisfactory showing the court was justified in concluding that the minor heirs had been supported from the funds of the estate, and that the insurance money had been kept intact for the use of the beneficiaries.

It is urged by the appellant that even if this view of the law be adopted by this court, the petitioner should in any event be charged with her maintenance since she reached her majority. The answer to this contention is two-fold; first, it is impossible to tell from her guardian's accounts with the petitioner what portion of this expense bill was contracted before the petitioner arrived at the age of majority, and what portion was contracted since that time; and second, for the reason above mentioned, that the accounts are so confused that it is impossible to tell whether these expense bills were paid out of the funds of the estate or out of the insurance fund; and if out of the funds of the estate, they could not be made a set-off against peti-

tioner's share of the insurance money, which is in no way connected with the estate.

This court being somewhat familiar with the history of this estate as shown by many other cases which have been before us in which it was involved, appreciates the annoyance, inconvenience and difficulties which necessarily beset the executors and the guardian in performing the duties which devolve upon them in the execution of their trust; but the very difficulties of the situation ought to prompt a strict compliance with the law in regard to the time and character of their reports to the court, and frequent, explicit and distinct accountings, so that the court, who ought always to jealously guard the interest of minor heirs, could see at a glance the condition of the estate, particularly so far as its relations with the guardian and executors are concerned.

We have examined the other propositions discussed by the appellant, but from all the circumstances of the case we think the judgment should be affirmed.

STILES, SCOTT and ANDERS, JJ., concur.

HOYT, J., dissents.

[No. 1167. Decided February 23, 1894.]

B. F. CORLISS, *Appellant*, v. PATRICK DUNNING, *Respondent*.

EASEMENT—TO DIG GRAVEL—INJUNCTION—COUNTERCLAIM—
TRESPASS—PLEADING.

Although the reservation made in a deed of the right to take gravel from the grantee's land for the purpose of repairing a mill dam is general in terms and fixes no place from which gravel should be taken, yet the fact that for more than ten years gravel had been taken from a certain pit on the land, which was the nearest and most convenient place from which the plaintiff could take gravel,

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and no other specific place had been pointed out by the grantee which was equally convenient, is sufficient to render such place an established pit, and give the plaintiff a right to take gravel therefrom without interference.

In an action to enjoin defendant from interfering with plaintiff's right to take gravel from defendant's land, defendant cannot counterclaim for damages committed by plaintiff to defendant's land and growing wheat, when such trespass has no connection with his taking of gravel.

Proof of damages subsequent to the commencement of an action is inadmissible under an answer which states "that for the period of one year prior to the commencement of said cause the plaintiff . . . has wrongfully and oppressively torn down defendant's fences," etc.

Appeal from Superior Court, Thurston County.

Milo A. Root, for appellant.

W. I. Agnew, for respondent.

The opinion of the court was delivered by

STILES, J.—By reservation made in a deed from the common grantor of plaintiff and defendant, the plaintiff, who was the owner of certain lands with a mill and mill pond located thereon, was entitled to take gravel from the defendant's land for the purpose of repairing his mill dam. For a number of years he had taken gravel from a place on defendant's land where there was an established gravel pit, and immediately preceding the commencement of this action was desirous of taking more gravel therefrom to make necessary repairs on his dam. This pit was at a point on defendant's land nearest to the location of the dam. The defendant, apparently denying the plaintiff's right to take gravel at all from his land, had obstructed the pit with logs and stumps and built a fence across the mouth of the pit adjoining the highway; and when plaintiff went with his help to take gravel he was opposed by the defendant with force and threats of assault. Plaintiff then brought this action to restrain the defendant's interference.

The reservation made in the deed which conveyed this land to the defendant was general in terms and fixed no place, and provided no means for fixing the place, from which gravel should be taken; and the court below, on the trial of the case, seeming to consider that the defendant had a right to fix the place from which gravel should be taken, found against the plaintiff on the ground that there were other points on defendant's land from which gravel might be procured with less damage to the defendant. In fact, the effect of the finding was that plaintiff must take gravel in such places as would least damage the defendant. The only showing that defendant would be damaged at all by the taking of gravel from the old pit was the proof that this pit was located at the edge of a pasture or hay field, and that as gravel was taken away the surface of the soil tended to cave and thereby slightly reduce the area of the field.

While it may be said that the taking of gravel under such a reservation as defined the plaintiff's right should be accompanied with due care of the defendant's rights, we think the fact that for ten years or more gravel had been taken from this pit, and that it was an established pit, and that this was the nearest and most convenient place from which plaintiff could take gravel, and no other specific place was pointed out by the defendant which was equally convenient, the plaintiff should have been permitted to continue to take gravel therefrom as his reasonable necessities required, and that the judgment should have been in his favor continuing the injunction.

The second point in the case is, that the court erred in permitting the defendant to introduce evidence tending to show two acts of the plaintiff causing damage to the defendant after the commencement of the suit. The first of these acts consisted in throwing down the fence at the pit and leaving it down, so that cattle entered defendant's

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field and destroyed his growing crop of grass. This act, if properly pleaded, might, perhaps, have been a legitimate counterclaim, even in the action which plaintiff brought; but the other act complained of could not constitute a counterclaim in this action. It was alleged in testimony that after the commencement of this action the plaintiff had gone to a place upon his own land and made an excavation therein so near to the defendant's land that when rains came defendant's land caved and fell into the excavation, causing damage to his growing wheat. This trespass, if it amounted to one, was an independent transaction, not connected with the reservation authorizing plaintiff to take gravel, and not connected with his taking of gravel from defendant's land, and was no proper subject of counterclaim in an action to restrain the defendant from interfering with plaintiff's exercise of his right under the reservation. But, however that might be, none of this alleged damage was pleaded as a counterclaim at all, but merely as an affirmative answer; and if the affirmative answer were to be construed as a counterclaim by reason of the prayer for damages, still the allegation of damage was insufficient to admit proof of the damage testified to. The allegation of the answer was:

“That for the period of one year *prior to the commencement of said cause* the plaintiff has wrongfully, maliciously and oppressively claimed the right to go upon that portion of said premises improved and in cultivation as herein stated, and disregarding the rights of this defendant in the premises, has wrongfully and oppressively torn down defendant's fences, trampled down and destroyed his growing crops, and otherwise greatly damaged and injured this defendant, upon the pretext of exercising a right to make use of the earth and gravel upon defendant's land, none of which acts were necessary or requisite to the full enjoyment of plaintiff's supposed right to make use of the earth and gravel upon said premises for the purpose of repairing or building his said mill dam. That by reason of said un-

lawful acts of plaintiff, as set forth in the preceding paragraph hereof, defendant has been damaged," etc.

As was stated before, the only testimony concerning damages was as to acts which occurred subsequent to the commencement of the action. The defendant justifies the admission of this testimony on the ground that although the first part of the paragraph quoted refers to a period prior to the commencement of the action, the charge is in the present tense, "has wrongfully and oppressively torn down defendant's fences," etc., which referred to the time of the filing of the answer; and that, therefore, the testimony was competent.

This testimony was objected to at the trial on the ground that no such matters had been pleaded in the answer, so that the defendant had full notice of what was demanded of him. He might have amended on leave of the court, and, unless the plaintiff showed surprise, the proof could have been admitted. But reading the allegations as they stand we cannot construe them otherwise than as the appellant contends, viz., that the whole paragraph was intended to describe transactions occurring before the commencement of the action. The admission of the proofs and the judgment which followed in favor of the defendant for damages was error.

The judgment will be reversed, and the cause remanded with directions to the court to enter judgment in favor of plaintiff for the relief demanded in the complaint.

DUNBAR, C. J., and HOYT, SCOTT and ANDERS, JJ., concur.

[No. 1107. Decided March 1, 1894.]

JAMES H. SHOTWELL *et al.*, Respondents, v. R. B. DODGE,
Appellant.

APPEAL — BILL OF EXCEPTIONS — DIVERSION OF WATERS — ACTION
BY RIPARIAN PROPRIETOR — PLEADING — DAMAGES.

Where the record on appeal contains an exception to the refusal of the court to grant a new trial on the ground of the insufficiency of the evidence, and a bill of exceptions is made a part thereof for the purpose of bringing the evidence into the record, it is unnecessary that the bill of exceptions contain any assignment of error.

In an action by a riparian proprietor of lands for damages for the diversion of water from a flowing stream, it is not necessary that the complaint allege that the plaintiff had the right to use the water of the creek, or any portion of it.

Where a lower riparian proprietor can make use of the waters of a flowing stream for purposes of irrigation and domestic use only by means of a dam which floods the waters back upon the land of an upper riparian proprietor, he is not in a position to recover damages for the diversion of a portion of the waters of the stream by the upper proprietor.

Where an upper riparian proprietor diverts a considerable portion of the water from a flowing stream without showing a reasonable use thereof, a lower proprietor is entitled to nominal damages.

In an action for special damages for the loss of a hop crop by reason of the diversion of the waters of a stream so as to deprive the irrigating ditches of a riparian proprietor of water, the measure of damages is the market value of the crop alleged to be lost over the cost of producing, harvesting and marketing.

Appeal from Superior Court, Thurston County.

James A. Haight, for appellant.

John P. Judson, for respondents.

The opinion of the court was delivered by

STILES, J.—The respondents move to strike the bill of exceptions containing the evidence in this case, on the ground that no error is assigned upon any matter excepted

to in the bill itself. The point, we think, is not well taken. The exception is contained in the record, being an exception to the refusal of the court to grant a new trial on the ground that the verdict was not sustained by the evidence. The bill of exceptions is merely a part of that exception, containing as it does all the evidence introduced at the trial. Where the error alleged is the refusal of the court to grant a new trial on the ground of the insufficiency of the evidence, the only way to correct the error in this court is by presenting all the evidence in the case, either in the form of a bill of exceptions or statement of facts. The motion is, therefore, denied.

The complaint in this case is for the diversion of water from a flowing stream, to the plaintiffs' damage. The complaint alleges that the plaintiffs were, at the date of the commencement of the action, and at all times in the complaint mentioned, the owners of a certain tract of land described, and were in possession thereof; and that they and their grantors had owned said land and been in the sole and exclusive possession of the same since the year 1854; that the defendant owned a half section of land lying immediately north of and adjoining plaintiffs' tract; that through the lands of both parties a brook or creek, viz., Mima creek, flowed from north to south within a well defined channel protected by natural banks; that plaintiffs in 1891 built a dam across Mima creek upon their own land, constructed various ditches therefrom to irrigate their lands in connection with their farming operations in raising hops, grain, vegetables and fruits, and also for the purpose of conveying the waters of the stream to their dwellings and barns, to use the same for domestic purposes; that the land was entirely dry, and without irrigation was not productive; that in 1892 the defendant built a dam across the creek on his land, whereby he completely stopped the water from flowing in its accustomed channel through plaintiffs'

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land, as it was accustomed to flow, and from flowing into and through plaintiffs' ditch; that in connection with his dam the defendant also constructed a ditch by which he carried the waters of said creek eastward over his own land where he permitted it to scatter and waste without providing any artificial channel for its return to the bed of the creek.

The damages laid for a diversion of the water were \$5,000, and special damages were also pleaded by showing that a crop of hops which plaintiffs grew on their lands in 1892 were decreased in value in the sum of \$1,000, and \$250 was claimed for the plaintiffs' deprivation of water for domestic purposes.

The defendant demurred to this complaint for the reason that there was no allegation that the plaintiffs had the right to use the water of the creek or any portion of it. It will be observed that one of the grounds of damage alleged is the mere diversion of the water from its accustomed channel, and appellant's position is, that such action, coupled with the allegations of waste which the complaint contains, is insufficient in law to base a claim of damages upon. Every owner of land through which a natural stream of water ordinarily flows is entitled to have such flow continued without interruption or diminution, except as the interference may be caused by the reasonable use of water by other proprietors of the stream higher up along its course. To sustain an action for damages of this character no allegation of any actual use is necessary. The right to the flow is absolute, and when that has been interrupted the right to nominal damages is complete. *Parker v. Griswold*, 17 Conn. 287.

We have examined numerous precedents for complaints in such cases, including those cited in 2 Chitty's Pleadings (6th ed.), 624, *et seq.*, and those noted in 2 Boone on Code Pleading, 326; and without exception they contain in each

instance an allegation of the right to use flowing water. But in view of the fact that this right to the uninterrupted flow of water is a part of the land itself, we see no necessity for an allegation that the owner and possessor of the land is also the possessor of this right, because the ownership and possession of the land implies the ownership and possession of the right as well. Counsel urges that the right is separable from the land, and might have been conveyed, or the right to the use of the water by some other party might have been acquired by prescription. But it must be remembered that the wrong complained of is a trespass, and by analogy with other cases of trespass upon real property the allegation would be unnecessary. It is a trespass for one person to step upon the land of another, and damages may be recovered therefor, but it is not necessary in such case that the pleader allege that the plaintiff had a right to have the grass upon which the trespasser trod continue to grow after the manner of its nature. A complaint for the injury or destruction of trees need not allege that the owner and possessor of the land upon which the trees grew had a right to have them continue to grow. In each case if, as a matter of fact, the owner of the land has parted with the grass or trees to some third person, who in that case would be the injured party, it is the privilege and duty of the defendant to plead those facts as his defense. So, if the land owner has parted with his right to the flowage of water, where the gravamen of the action is the interruption of the flow, the alienation is matter of defense.

The only other error alleged in this case is, that the evidence did not justify the verdict, and upon that point we find it necessary to agree with appellant. The jury found a verdict for \$850. Under the facts shown we think the evidence sufficient to have justified a verdict for nominal damages against the defendant for the diversion of the

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water. He confessed to the building of a dam in the bed of the stream, and to the diversion of a considerable portion of the water therefrom, and showed no reasonable use thereof.

So far as his use of the water for domestic purposes was concerned, his acts might possibly have been sustained, but his pretended irrigation seems to have amounted to nothing more than the digging of a single ditch for a long distance through his farm, and allowing the water to flow freely through it until it became lost at the end of the ditch. The soil through which the ditch passed was of such a character that a very large amount of water would necessarily be lost in its mere passage through the ditch. Allowance must of course be made for some such loss, but when the loss becomes extreme by reason of the porous character of the soil, and water is scarce, it becomes necessary for an irrigator to take reasonable means to lessen the amount of loss.

As to defendant's irrigation itself, it amounted to nothing more than suffering the water in the ditch to percolate sidewise through the banks along which certain orchard trees and garden vegetables were growing. This was not irrigation at all; much less, reasonable irrigation. Where water is an important feature in the success of farming operations, it becomes the irrigator to use proper means to bring water to points where it is needed, to use it only at such times and in such quantities as are necessary for the purpose, and then, if others situated like himself require the water, to stop its flow until it shall again become necessary. The constant flow of water in the ditch all the summer through to the extent to which the defendant caused the water of Mima creek to flow would be inexcusable under any circumstances, when others had equal need of the water for irrigation.

But beyond this nominal damage the plaintiffs showed

no facts upon which a substantial recovery could be based. At the highest point on the creek on their farm, immediately adjoining the defendant's land, they also constructed a dam nine feet high and dug a ditch. The point at which their ditch left the creek seems to have been a difficult one from which to take out water, but their object was to run the water at a right angle from the creek a distance of from a quarter to a half of a mile and there discharge it at a high point on their land, so that it would irrigate a large area which they had planted in various crops. To accomplish this purpose at all the bottom of their ditch had to be some five feet above the level of the stream. Their dam, therefore, as stated before, was nine feet high, and the water had to be set back in the reservoir or pond to the depth of at least six or seven feet before it would make the required depth in their ditch. The effect of this was to set the water back upon the defendant's land so that it overflowed a half acre or more.

Conceding that it was competent for the plaintiffs to build their dam where they did, they had no right to cause the water to spread itself out in a pond on the defendant's land. Just how high they could raise the water at their dam before it would flow back on to defendant's land did not appear; and neither did it appear that without such reflow of the water they would have had any water whatever in their ditch. They cannot base their right of action upon a wrong committed by themselves, and until it be shown that without committing such wrong to defendant their ditch would have furnished the water of which they say they were deprived they cannot maintain their action.

As to the evidence of damage, nothing was shown as to the damage suffered by deprivation of water for domestic use, except that it was sometimes necessary to carry water from the stream to their houses, a quarter of a mile distant, instead of getting it from the ditch. But, while they would

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have had a right to complain of their loss for domestic purposes had none been left in the stream, as there was, in fact, at all times abundant water for such purposes in the stream, they cannot complain that their ditch did not furnish it at the distance at which their houses stood unless it be shown that when the water in the dam was lowered, so as to relieve defendant's land from the reflow, water would still have been served to their houses in the ditch. Moreover, nothing was shown as to what amount of inconvenience or loss of time or labor was involved in getting the water for domestic purposes from the stream.

As to the hops, it appeared that, in 1891, seventy-nine bales of hops were raised on ten acres when water was plenty, and that in 1892 from fifteen acres only fifty-nine bales were raised, water being scarce. The difference in the quantity of hops in the two years was some 14,000 pounds, estimating the additional five acres of 1892 as full bearing hops; but it was shown that this was the first year of those five acres, when they were not expected to bear to any profitable extent. Conceding, however, that there was a considerable loss by reason of the want of water, the evidence merely showed that hops were worth from 13 to 22 cents a pound in 1892, and the case was left to the jury upon the inference that the gross amount of hops at the price of hops in that year would have been the actual loss. But such is not the measure of damages in such cases. The net loss is all that can be recovered, viz., the market value of the crop alleged to be lost over the cost of producing, harvesting and marketing. *Lommeland v. St. Paul, etc., Ry. Co.*, 35 Minn. 412 (29 N. W. 119); *Holden v. Lake Co.*, 53 N. H. 552; Sedgwick on Damages, §§191, 937; *Smith v. Chicago, etc., R. R. Co.*, 38 Iowa, 518.

But, as was said before, until it should appear that with the water at the dam lowered to a point where it would not flow over defendant's land, there would have been water

enough in the ditch to have saved the hops, there could be no recovery for their loss.

Judgment reversed, and cause remanded for a new trial.

ANDERS and SCOTT, JJ., concur.

HOYT, J. (*concurring*).—I concur in the result and in what is said as to the damages, but not in what is said as to the sufficiency of the complaint, as to which I express no opinion.

DUNBAR, C. J., dissents.

8	344
10	357
36	356
39	136

[No. 1143. Decided March 1, 1894.]

HOLBROOK, MERRILL & STETSON, *Respondent*, v. PETERS & MILLER COMPANY, *Appellant*.

ATTACHMENT—GROUNDS—PREFERENCE BY INSOLVENT CORPORATION.

A transfer of property by an insolvent corporation whereby a preference is given to one creditor over others, while against equity and good conscience, is not such a fraud in fact as to afford ground for an attachment of such property at the instance of another creditor.

Appeal from Superior Court, Pierce County.

Bean & Fitch, for appellant:

It is not fraud *per se* to prefer a creditor, though all the property of the debtor be conveyed to the one preferred, leaving others unpaid. *Turner v. Iowa National Bank*, 2 Wash. 192; *First National Bank v. Carter*, 6 Wash. 494; *Furth v. Snell*, 6 Wash. 542; *Giddings v. Sears*, 115 Mass. 508; *Armstrong v. Cook*, 54 N. W. 873; *Farwell v. Brown*, 1 Fed. Rep. 132; *Furniture Co. v. Armstrong*, 26 Pac. 693. Even though an insolvent corporation may not prefer a creditor in equity, in law such a preference is valid. *Thompson v. Huron Lumber Co.*, 4 Wash. 600; *Wait, Insolvent Corporations*, § 156; *Patterson v. Lynde*, 106 U. S. 519.

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Frederick A. Brown (*John D. Fletcher*, of counsel), for respondent:

The officers of an insolvent corporation are trustees for all creditors, and any attempt by them to give one creditor an advantage is a breach of their trust, and a fraud upon other creditors. *Thompson v. Huron Lumber Co.*, 4 Wash. 600; *Rouse v. Bank*, 22 N. E. 293; *Upton v. Tribilcock*, 91 U. S. 45; *Haywood v. Lincoln Lumber Co.*, 64 Wis. 643; *Corbett v. Woodward*, 5 Sawy. 403; *Bradley v. Farwell*, 1 Holmes, 437.

The opinion of the court was delivered by

STILES, J.—The respondent procured an attachment against the property of appellant, alleging as a ground for the issuance of the writ, “that the defendant is and has been for some time prior hereto an insolvent corporation, as affiant verily believes, and while so insolvent did, on the 21st day of June, 1893, assign and dispose by bill of sale, deeds and assignments, to the Columbia National Bank, all of its property, with intent to delay and defraud its creditors; that said attachment is not sought, and said action is not prosecuted, to hinder, delay or defraud creditors.”

Upon motion to set aside the attachment, it appeared that the transfer of possession to the Columbia National Bank was made to enable the bank, as a creditor of the Peters & Miller Company, to dispose of the property transferred for the purpose of enabling it to satisfy certain notes which the bank held, and which had been executed and delivered to it by the Peters & Miller Company, and secured by chattel mortgage; in other words, the Peters & Miller Company, a corporation, had sought to make the bank a preferred creditor, after it had become insolvent and ceased to be a going concern, as the plaintiff alleged.

We do not think the attachment statute contemplates

that such action on the part of a debtor, although it be an insolvent corporation, shall be ground for an attachment. The right of attachment is based upon the supposed existence of fraud in fact, and not upon what is merely voidable because against equity and good conscience, sometimes denominated fraud in law. It is not a fraud in fact for a debtor, whether a natural person or a corporation, to prefer a creditor, and it is only because the law regards the assets of an insolvent corporation as a trust fund for all its creditors that it interferes with preferences made by debtors of that class. If the Peters & Miller Company was an insolvent corporation at the time it transferred its property to the bank, its other creditors can have adequate relief upon alleging sufficient grounds therefor, by complaint in equity to subject its assets, in the hands of the bank, to an equal distribution, in which all its creditors can participate. The ground upon which they must base an action for that purpose will be equitable, and not purely legal. To sustain this attachment would be to permit the respondent to make itself a preferred creditor, which is the very gist of its complaint against the appellant in its treatment of another creditor.

The action of the superior court in sustaining the attachment was, therefore, erroneous, and the order denying the motion to set aside the attachment must be reversed. So ordered.

DUNBAR, C. J., and HOYT, ANDERS and SCOTT, JJ.,
concur.

[No. 1189. Decided March 1, 1894.]

8	847
27	88

THE PACIFIC MANUFACTURING COMPANY, *Chris Kuppler*,
Receiver, Respondent, v. E. BROWN *et al.*, *Defendants*,
 HENRY B. HICKEY AND EUGENE H. JEFFERSON, *Appel-*
lants.

L. H. SULLIVAN *et al.*, *Respondents*, v. E. BROWN *et al.*,
Defendants, HENRY B. HICKEY AND EUGENE H. JEF-
 FERSON, *Appellants*.

MECHANIC'S LIENS — LIMITATIONS — MORTGAGES — LIS PENDENS
 — NOTICE — ATTORNEY AND CLIENT.

Where proceedings to enforce a mechanic's lien have been commenced within the time limited by § 1670, Gen. Stat., the fact that judgment is not rendered until after the expiration of such limitation will not defeat the lien.

Where a lien claimant's right to lien accrues subsequent to the commencement of a mortgage foreclosure suit on the premises, and such lien claimant has actual knowledge of such suit, and does not seek, by intervening or otherwise, to protect his rights, he is bound by the judgment in such foreclosure suit.

In a proceeding to enforce a lien against premises which have been sold under decree in a suit for foreclosure of a mortgage, to which the lien claimant was not made a party nor had knowledge thereof through notice of *lis pendens*, the burden of proof is upon the party claiming under the foreclosure sale to establish by a clear preponderance of the evidence that the lien claimant had actual knowledge of the pendency of the foreclosure suit.

The fact that the attorney for the plaintiff in the mortgage foreclosure suit was the attorney for the claimant in the lien foreclosure suit, will not charge the lien claimant with notice of the pendency of the suit to foreclose the mortgage.

Where a material man refuses to furnish materials for a building under his contract with the contractor, but makes a new contract with another party for furnishing materials for the completion of the building, his claim of lien for materials under the old contract must be filed within ninety days after ceasing to furnish materials thereunder.

Appeal from Superior Court, King County.

Smith & Littell, and *James F. McElroy*, for appellants.

Wiestling & Wiestling, and *Laban H. Wheeler*, for respondents.

The opinion of the court was delivered by

SCOTT, J. — The Pacific Manufacturing Company and the Yesler Wood, Coal & Lumber Company separately instituted proceedings to foreclose liens upon certain lands for materials furnished, which were used in the construction of a building erected thereon. These actions were consolidated and tried with two certain other actions also brought to enforce liens against said property. The lands in controversy were alleged by the Pacific Manufacturing Company and the Yesler Wood, Coal & Lumber Company to have belonged at the time of the filing of their liens to the defendant Eliza Borella, in which lands the defendant Hickey had acquired an interest by reason of a sheriff's deed issued to him pursuant to a sale on a judgment foreclosing a mortgage executed by said Eliza Borella on said lands and premises to him. The intervenor Jefferson claims and has an interest in said lands and premises under and by virtue of a sheriff's deed executed to him upon a certificate of purchase given by reason of a sale pursuant to a judgment foreclosing a mortgage thereon of date September 2, 1879. The proceedings to foreclose said last named mortgage were commenced April 25, 1891, and judgment was entered thereon October 12, 1891. The mortgage was recorded September 4, 1879, and apparently was a prior incumbrance to the lien claims here in controversy. Judgment was rendered in the lower court in July, 1893, establishing the liens of the Pacific Manufacturing Company and the Yesler Wood, Coal & Lumber Company, and an appeal was taken. At the time the suit to

foreclose the mortgage last mentioned was commenced, neither of said lien claimants had filed their notice or claim of lien, and neither of them were made parties to said suit.

It does not appear that appellant Hickey, although named as a party defendant, was served with process in the suits to foreclose said liens. On November 21, 1891, he appeared and answered in the suit wherein the Yesler Wood, Coal & Lumber Company was interested. This was after the rendition of the judgments in said mortgage foreclosure suits. He first appeared and answered in the lien suit brought by the Pacific Manufacturing Company on October 7, 1891, and subsequently filed a supplemental pleading. Appellant Jefferson intervened in said lien suits, respectively, in January and March, 1893. The rights of said appellants are somewhat antagonistic to each other, but no point is made thereon in this appeal, and as they are both desirous of defeating said lien claims they have united in one brief, and present the points hereinafter discussed in common.

It is contended by appellants that the lower court erred in refusing to dismiss the actions brought to foreclose said liens because more than two years had elapsed from the time when the materials were furnished. It is contended that under § 1670, Gen. Stat., suits to enforce such liens must be terminated by obtaining a final judgment within two years from the time of the furnishing of the materials, or the expiration of the credit, if any is given, and unless said liens are established and finally determined within such period of two years that the lien claims lapse and become lost. It is not contended that said proceedings were not commenced within the time limited by said statute.

We are of the opinion this point is not well taken, and that said statute only relates to the time of the commencement of the action; that is, that the action must be commenced within eight months after the claim has been filed.

Or, if a credit be given, then within eight months from the expiration of such credit; and that the following clause, "but no lien shall continue in force under this chapter for a longer time than two years from the time the work is completed by agreement or credit given," means that such credit cannot be extended for a longer time than two years, and the lien maintained.

It is further contended by the appellants that said lien claimants were barred from waging their actions herein by reason of the judgment rendered in the case of *The Oregon & Washington Mortgage Savings Bank, Limited, v. Anthony Borella et al.*, being the mortgage foreclosure suit heretofore mentioned wherein judgment was rendered on October 12, 1891, although they were not parties thereto. No notice of *lis pendens* was filed in foreclosing this mortgage, but it is contended by appellants that these lien claimants had actual knowledge of the pendency of said suit. It is contended that one Mr. Stone, who was the manager of the Yesler Wood, Coal & Lumber Company, had notice thereof in the spring of 1891, and that the Pacific Manufacturing Company had such knowledge by reason of information furnished to one Hauser, who was the manager of said company; and further, that it must be charged with notice because it appears by the record that its attorney, who drew the lien notice and complaint to foreclose the same, had notice thereof, and was in fact the attorney for the plaintiff in said mortgage foreclosure suit.

The actions to foreclose said lien claims were commenced May 16 and September 24, 1891, respectively, during which time said suit to foreclose the mortgage aforesaid was pending; and it appears that neither of said lien claimants took any steps, by intervening or otherwise, to protect their rights in the premises in the judgment of foreclosure therein sought to be obtained, but remained quiescent, and

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allowed the property to be sold at sheriff's sale, and a sheriff's deed to issue to the intervenor Jefferson.

It is contended by the respondents that said lien claims were not barred by the proceedings had in the suit foreclosing said mortgage, for the reason that no notice of *lis pendens* was filed pursuant to the statute, and they deny also that said companies, or either of them, ever had any actual notice of the pendency of said suit; and the Pacific Manufacturing Company contends that it was not bound by the knowledge of its attorney aforesaid.

As to the Yesler Wood, Coal & Lumber Company, we are satisfied from an examination of the testimony of its general manager, Mr. Stone aforesaid, that said company had notice of the pendency of said suit foreclosing the mortgage by reason of knowledge thereof obtained by him in the spring of 1891, and as to the claim of this company appellants' point is well taken.

It does not appear that at the time foreclosure proceedings were instituted on the mortgage that the mortgagee had any notice of the rights or claims of these lien claimants in and to said premises, as at that time neither of said notices of liens had been filed. Nor does it appear that said mortgagee, or appellants, had any knowledge of the furnishing of the materials by either of these claimants, but if they did have, they could not well be held to know that a lien would be claimed against the premises therefor, for that might not follow. The furnishing of materials does not give a lien, but a notice of the same must be filed as provided by statute. Consequently their rights in this particular accrued subsequent to the commencement of said foreclosure suit, and as the Yesler Wood, Coal & Lumber Company had notice of said suit it was bound by the judgment therein rendered. *Sampson v. Ohleyer*, 22 Cal. 200; *Sharp v. Lumley*, 34 Cal. 611; *Lovejoy v. Murray*, 3 Wall. 1; *Robbins v. Chicago*, 4 Wall. 657.

We are constrained to find against appellants as to their contention that the Pacific Manufacturing Company had actual knowledge of the pendency of said foreclosure suit, although it appears by the testimony of one witness that he informed Mr. Hauser, the manager of said company, of the pendency thereof, and that the same was talked over with him, and with others before him upon a number of occasions. This, however, is expressly denied by Mr. Hauser, and it was for appellants to furnish a preponderance of proof on this point. The plaintiff in the suit to foreclose said mortgage might have reduced its rights to a certainty, and set all such questions at rest, by filing a notice of *lis pendens* under the statute. Not having done so, we would not find in appellants' favor on the question of actual knowledge, unless there was a very clear preponderance of proof in their favor. *Riley v. Hoyt*, 29 Hun, 114.

Nor do we think the Pacific Manufacturing Company should be held to have had notice of the pendency of said mortgage foreclosure suit because its attorney, who drew the lien notice and prosecuted its suit to foreclose said lien claim, had knowledge of it, and was the attorney prosecuting said mortgage foreclosure suit, as we cannot say that said attorney obtained his knowledge as attorney for, and in the course of his employment by, the Pacific Manufacturing Company, although the proceedings to foreclose the mortgage and to enforce the lien were both directed against the same property. The law seems to be settled that a party is charged with notice of a fact of which his attorney had knowledge, where such knowledge is obtained in the course of his employment for the party sought to be charged with notice. *Hood v. Fahnestock*, 8 Watts, 489 (34 Am. Dec. 489); *Rogers v. Palmer*, 102 U. S. 263.

This case does not fall clearly within the rule, and as it is a harsh one, it ought not to be extended. Said company

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should not be held to have lost its rights in the premises because of its failure to intervene in said mortgage foreclosure suit, or to take such steps as it might have taken to protect its rights in the premises by reason of the fact that the attorney whom it had employed to represent it had knowledge of such foreclosure.

But various other objections are raised by appellants to the sufficiency of the lien claim of the Pacific Manufacturing Company, one of which is that the notice of lien was not filed within ninety days after said company ceased to furnish materials for the building. It appears that the contract under which said materials were furnished was made by said company with one Brown, who was the contractor for the erection of the building. It is contended by appellants that said company delivered materials under this contract with Brown only up to and including March 6, 1891. It appears that the only materials furnished by the company after March 6th were delivered on March 21st and 23d, and it is contended by appellants that these materials were delivered under and by virtue of a new contract entered into between said company and appellant Hickey, who was not a party to the original contract. The lien notice of the Pacific Manufacturing Company was filed June 12, 1891, which was more than ninety days after it ceased to furnish materials under the contract with Brown, as contended by appellants, if the last delivery of materials thereunder was on March 6th, but was within time if the last delivery was on March 23d.

It is contended by appellants that some few days after March 6, 1891, at a meeting of a number of persons interested in said property, the Pacific Manufacturing Company, through its agent, Hauser, refused to deliver any more materials for the building under its contract with Brown, and thereupon that Hickey, who was interested to the extent of several thousand dollars in said building, agreed to

pay for such further materials as would be necessary to complete the building. The respondent company admits a conversation between said parties at said time, and claims that it was asking for security for the materials furnished and to be furnished, and that, in pursuance of the conversation there had, appellant Hickey thereafter executed his note to the company for two hundred dollars, which was subsequently paid. It is contended by said respondent that this payment was not made in pursuance of any new contract entered into at the time for the sale of materials, but was made by Hickey to apply on Brown's contract with them as aforesaid. It appears, however, that a bill was made out by the company against Hickey amounting to \$215 for the materials furnished after March 6th, and payment was demanded of him, whereupon he executed his note for two hundred dollars to the company, payable in thirty days, said note reciting that it was given for lumber, sash and doors used on the Borella building after March 20, 1891, and covered the materials included in the bill rendered to Hickey. This much appears from the testimony of said witness Hauser, and said exhibits.

It further appears by the testimony of a witness called by appellants, who was present at said conversation, that the Pacific Manufacturing Company at said time absolutely refused to furnish any more material under its contract with Brown unless its pay therefor was guaranteed, and that it asked for security for the whole amount furnished, and to be furnished. That appellant Hickey refused to guarantee the payment, or pay for materials which had been furnished by said company, but offered to pay for such further materials as were necessary to complete the building, and stated that if said company would not furnish them he would procure the same elsewhere, whereupon said company through its agent Hauser agreed with Hickey to

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furnish the necessary doors, etc., for the completion of the building upon his agreement to pay therefor.

We have not given all of the testimony upon this point, but have mentioned the salient points, and we are of the opinion that the clear preponderance of the proof is in favor of the appellants, and that said Pacific Manufacturing Company did cease to furnish materials under its contract with Brown on the 6th day of March, and that the materials it furnished thereafter for use in said building were furnished under its contract with Hickey, and for which it fairly appears Hickey paid, although there is no testimony explaining the discrepancy between the sum paid and the sum for which the bill was rendered to him.

Under this state of facts, the lien claim of the respondent company must fail, for the reason that it did not file its notice within ninety days after it had ceased to furnish material under its contract with Brown.

Reversed.

DUNBAR, C. J., and ANDERS, J., concur.

HOYT and STILES, JJ., concur in the result.

[No. 1112. Decided March 5, 1894.]

J. D. LOWMAN AND MARY R. LOWMAN, *Respondents*, v.
D. W. WEST *et al.*, *Appellants*.

ACTION OF UNLAWFUL DETAINER—PLEADING—DEMURRER.

The pendency of another suit between the same parties for the same cause of action cannot be raised by demurrer unless such fact appears on the face of the complaint.

A demurrer does not lie to a single paragraph of a complaint unless it purports to present a complete cause of action.

A complaint in an action of unlawful detainer, which alleges that certain of the defendants were in possession of the premises

8	355
18	236
8	355
428	77
8	355
429	287

in controversy as tenants of plaintiff, that certain other defendants claim some right of possession under said tenants, that the notice to defendants to pay rent or surrender the premises was duly and legally served in accordance with the laws of the state relating thereto, merely states conclusions of law, and is not sufficient under Laws 1891, p. 179, requiring the plaintiff in such action to "set forth the facts on which he seeks to recover." (DUNBAR, C. J., and HORT, J., dissent.)

In the summary proceeding authorized by the action of unlawful detainer, the fact that defendants by their answer in effect dispute their landlord's title will not forfeit their right to notice to surrender the premises nor excuse the plaintiff's pleading and proving its service.

Appeal from Superior Court, King County.

P. P. Carroll, for appellants.

Curr & Preston, and *W. R. Bell*, for respondents.

The opinion of the court was delivered by

STILES, J.—The material portions of the complaint in this case (an action for unlawful detainer), so far as the merits were concerned, were as follows:

1. That plaintiffs were husband and wife.
2. That at all times herein mentioned the defendants, D. W. West and Lloyd Jones, were and are now in the possession of [description], as the tenants of the plaintiff J. D. Lowman. That said tenancy of said defendants was and is a tenancy from month to month, with monthly rental reserved, payable monthly in advance on the first day of each and every month.
3. That the monthly rental reserved for the occupation of said premises by the said defendants, and by them promised to be paid therefor, was and is the sum of fifty dollars per month for each and every month of said tenancy, and that by the terms of said tenancy the same was and is payable monthly in advance on the first day of each and every month in advance for the then ensuing month of said tenancy.
4. That on, to wit, the 1st day of November, 1892, the defendants, D. W. West and Lloyd Jones, were indebted to the said plaintiff, J. D. Lowman, for the rent of

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said premises for the months of [ten months in all], amounting in all to the sum of \$500. That subsequent to the said 1st day of November, 1892, and on, to wit, the 18th day of November, 1892, no part of said rent having then been paid, and the whole thereof, to wit, the said sum of \$500 being then due and payable, the said plaintiffs made a written notice requiring said defendants in the alternative to pay the said rent or to surrender the possession of the said premises within three days after the date of the service of said notice upon them.

5. (Shows service of the notice on West and Jones.)

6. That more than three days have elapsed since the service of said notice upon said defendants, and the said defendants have failed and refused and do now fail and refuse to pay the said rent or any portion thereof, and have failed and refused and do now refuse to surrender the said premises to said plaintiff.

7. That no part of said rent has been paid, and the whole thereof is now due and payable, and the said defendants now unlawfully detain the said premises from the possession of the plaintiff, J. D. Lowman, although possession thereof has been duly demanded.

8. That the defendants [other defendants named], claim to have some right of possession to portions of said premises, under the said West and Jones. That the nature and extent of the rights of said defendants, if any they have, is to the plaintiffs unknown.

9. (Shows service of the notice on the other defendants.)

eight All of the defendants appeared and jointly demurred on grounds, viz.: (1) Defect of parties plaintiff. (2) *Defect* Defect of parties defendant. (3) Another suit pending *between* between the same parties for the same cause of action. (4) *Two* Two causes of action improperly joined. (5, 6, 7) Paragraphs 4, 5 and 6 state no cause of action. (8) The general demurrer.

The first four grounds were not well taken; the first, second and fourth because the defects and the misjoinder were not pointed out, and the third because the pendency

of another suit is a defense to be taken by plea, answer or proof under the general issue, unless it appears on the face of the complaint.

The fifth, sixth and seventh grounds were frivolous. A demurrer does not lie to a single paragraph of a complaint unless it purports to present a complete cause of action, which these did not.

The general demurrer, however, deserves more attention. An action under the unlawful detainer act of 1891 (Laws, p. 179), although it is within the jurisdiction of the superior courts, is none the less a special and summary proceeding, in which the power of the court to render an affirmative judgment depends upon the existence of certain statutory facts. The plaintiff "must set forth the facts on which he seeks to recover," is the language of this act, as it has been construed to be the express or implied requirement of all the acts governing this kind of proceeding. Mere conclusions of law have perhaps a less appropriate place in a complaint of this kind than anywhere in the realm of civil pleading, for it is proposed to summarily take the possession of real property from one man and give it to another without opportunity to plead anything but the general issue, or some affirmative defense like payment, eviction by the holder of paramount title, or some matter occurring since the tenancy commenced sufficient to terminate it.

Upon the merits of this case the complaint before us seems to abound in conclusions of law, rather than to contain statements of fact upon which the court could see whether sufficient facts existed. It is alleged in the first place that, at certain times, West and Jones were in possession of two certain lots as tenants of Lowman from month to month, at a rental of fifty dollars, payable in advance. But what was the arrangement or contract, written or oral, under which, either before or after their taking possession, West and Jones became, in law, the tenants of

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Lowman, or when it was made, or where, or with whom, or to whom the promise to pay rent was made, the pleading does not disclose. *Fowler v. Roe*, 25 N. J. Law, 549.

The third subdivision of § 3 of the act (1891, p. 180) declares that a tenant of real property is guilty of unlawful detainer, "when he continues in possession in person or by sub-tenant after a default in the payment of any rent, and after a notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner hereafter in this act provided)," etc. Section 5 prescribes the various methods of service. The complaint alleged that the notice "was duly and legally served upon the said defendants . . . in all respects in accordance with the laws of the State of Washington relating thereto." Respondents, relying upon general rules of pleading, contend that this is a sufficient allegation of service. But, keeping in mind that the right of the court to entertain the summary proceeding depends upon whether the tenant has failed either to pay rent or surrender the premises within three days after the service of the notice "in the manner hereafter in this act provided," we must hold that a statement of facts showing the required service is a most necessary part of the complaint. The tenant has a right to stand upon proof of the exact service required by the statute before he can be adjudged guilty, and the service proved must be of that kind which the circumstances pointed out in § 5 justify. It is not as though by appearing in the action he waived service or irregularities in making service; for the proof of service is a substantive part of the plaintiff's case, and the defendant is entitled to know how he is to be charged with having been put in default. Were there but one manner of service provided for there might be less ground for stating the facts; but when there are so many ways, and when the statute does not provide for the filing of any proof of ser-

vice, it would be unfair that the defendant should be expected to be ready to meet a mere allegation of due service.

Respondents urge that inasmuch as the principal appellants appear by their answer to repudiate their landlord's title, they forfeited any right to notice. Common law cases are cited in support of this proposition: *Von Glahn v. Brennan*, 81 Cal. 261 (22 Pac. 596); *Appleton v. Ames*, 150 Mass. 34 (22 N. E. 69); *Taylor, Landl. & Ten.*, § 522; but they have no application in this summary proceeding.

The filing of a joint general demurrer by all the defendants would not entitle the sub-tenants to have the complaint adjudged insufficient as to them, if a cause of action against any of the defendants were well pleaded. But, in our judgment, the statute is not complied with when it is merely stated that certain defendants "claim to have some right of possession to portions of said premises *under* the said West and Jones." Unless these persons are sub-tenants they cannot be sued in this proceeding; but the allegation that they claim "under" West and Jones does not necessarily imply sub-tenancy.

Numerous other objections to the complaint we do not find well taken. The evidence submitted was abundantly sufficient to sustain the judgment rendered, and we regret the necessity for reversing it. The appellants West and Jones entered upon tide lands located within the lines of Maynard's donation claim at Seattle, and sought to hold them against the owner. They were beaten in an ejectment suit, and paid a considerable judgment for detention of the premises. To avail themselves of the improvements they had erected they sought and obtained a lease in writing for one year, with the privilege of removing their improvements during the term. They paid rent through the term, and for several months thereafter, and then undertook to repudiate their tenancy, and after ten months

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refusal to pay rent, attempt in this proceeding to set up the matters adjudicated against them in the ejectment case. Their defense is without merit, and their action savors of obstinate obstruction rather than of an appeal to fairness and justice.

We cannot find that the portions of the act in question relating to unlawful detainer and the penalty of double damages are not properly embraced in the act; nor do we find any error occurring in the case, except the overruling of the demurrer to the complaint, which error can be obviated by amendment in the superior court.

Judgment reversed, and cause remanded for a new trial.

ANDERS and SCOTT, JJ., concur.

DUNBAR, C. J. (*dissenting*).— I think, construing all the allegations of the complaint together, that there are sufficient facts stated therein to notify the defendants what acts or omissions are complained of without the least danger of misleading them; and, if that be true, it is sufficient. The distinction between stating a fact and stating a conclusion of law is sometimes difficult to maintain, and making too fine a distinction will tend to render pleadings unnecessarily prolix, and raise discussions over mere quibbles. The judgment should be affirmed.

HORT, J.—I concur in what Chief Justice DUNBAR has said.

[No. 1216. Decided March 5, 1894.]

THE STATE OF WASHINGTON, *on the relation of A. W. Buddress, Respondent*, v. WILLIAM J. ROHDE, *Appellant*.

APPEAL—REVIEW—DEFICIENT RECORD.

Where a judgment has been founded on findings of fact and of law made by the court in an action at law, the failure to include such findings in the record on appeal will not entitle the appellant to a review of the judgment, although a proper statement of facts may have been brought up.

Where the question of the insufficiency of the complaint in an action to sustain the judgment has not been raised in the brief of appellant, it will not be considered on appeal.

Appeal from Superior Court, Jefferson County.

Warren Carroll, and *R. W. Jennings*, for appellant.

George H. Jones, for respondent.

The opinion of the court was delivered by

HORT, J.—The relator herein instituted this proceeding to test the title of appellant to the office of county superintendent of common schools for Jefferson county. Upon the issues made by the complaint and answer the cause was tried, and a judgment in favor of relator entered.

It appears from the record that the judgment was founded upon findings of fact and law made by the court, but such findings have not been brought here as part of the record. What purports to be a statement of facts is here, but as this was an action at law the only office of such statement under the circumstances shown by the record was that in the light of the facts shown thereby the findings of the lower court could be examined and their correctness passed upon, and, since they are not here, this court cannot enter upon an investigation of that question. It must follow

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that the appellant can get no benefit whatever from anything shown by the statement of facts.

This leaves but a single question that could have been raised upon the record presented to this court, and that is as to the sufficiency of the complaint to sustain the judgment. But this question the appellant has failed to so raise as to entitle him to be heard thereon. There is no intimation in his brief that he relies upon the insufficiency of the complaint for the reversal of the judgment, and this objection, like any other, must be raised in the brief to make it available. The record presents no question which in the light of the assignments of error in the brief can avail appellant.

The judgment must, therefore, be affirmed.

STILES and SCOTT, JJ., concur.

DUNBAR, C. J., and ANDERS, J., not sitting.

[No. 1058. Decided March 6, 1894.]

MARY E. BRENNAN, *Appellant*, v. FRONT STREET CABLE RAILWAY COMPANY, *Respondent*.

DEATH BY WRONGFUL ACT—CONTRIBUTORY NEGLIGENCE—NON-SUIT.

A judgment of non-suit will not be reversed if any one of the several grounds for the motion therefor is sufficient, although the court may have founded his ruling upon an inadequate reason.

Although contributory negligence is a matter of defense in this state, yet where in an action for damages as a result of defendant's negligence it appears by the plaintiff's case that he is chargeable with contributory negligence, the defendant is entitled to a non-suit.

In an action for damages for death caused by the wrongful act of defendant, there can be no recovery on the ground of the con-

tributory negligence of the deceased, when the evidence shows that deceased was an employé of a cable railway company; that among his duties was the placing of cans of lubricating oil on the dummy cars prior to their first trip, and the oiling of the sheave wheels of the cable before it was started for the day; that on the day of the injury he arrived a little late to his work, and that before he had replaced the planks above the manhole leading to the sheave wheels, after oiling them, he was angrily ordered by the superintendent to let the planks alone and get out the cars; that the first train was then being pushed out of the power house, and that he rushed into the house, caught up an oil can, and hastened to place it in position on the dummy car, which was at the time being pushed toward the sheave wheels, and that after arranging the can he stepped off the car into the uncovered manhole and was crushed to death by the sheave wheels.

Appeal from Superior Court, King County.

James Hamilton Lewis, and Ernest S. Lyons, for appellant.

Struve, Allen, Hughes & McMicken, for respondent.

The opinion of the court was delivered by

SCOTT, J.—This is an action for damages by a wife for the death of her husband, under § 8 of the Code of 1881. When the plaintiff introduced her evidence and rested, the defendant moved for a non-suit on three grounds, one of which was, that the plaintiff could not recover because the deceased was chargeable with contributory negligence. The court granted the motion, and plaintiff appealed.

It is contended by appellant that the lower court denied said motion on the ground of contributory negligence, but granted it on the first and second grounds alleged, and for that reason, that the question of the negligence of the deceased in the premises cannot be considered by this court, and for the further reason that contributory negligence is a matter of defense in this state. As we view the matter, it is immaterial which one of said grounds the lower court relied upon in granting the motion, for if any one of them

is sufficient, the judgment would not be reversed. And as to the further proposition, while contributory negligence is a matter of defense in this state, yet if it appears by the plaintiff's case that he is chargeable with contributory negligence, it is sufficient to defeat his right to recover.

It appears by the plaintiff's own showing that the deceased had been in the employment of the defendant company for some time prior to the accident, and the complaint alleges that his duties were to place cans of lubricating oil on the dummy cars, to fix and repair the trucks of said cars, and to oil the sheave wheels, which are described as located in front of the power house in a public street about two and a half feet beneath the surface. It appears that it was one of the duties of the deceased, in connection with the running and operating of the cars of the defendant company over its line of railway, to, before the cars started in the morning, oil the sheave wheels aforesaid, which bore the cable of said railway as it came from the power house, and that it was also his duty to refill and place on the dummy of each train as it left the power house, on its first trip in the morning, a small oil can.

On the 5th day of July, 1890, said Brennan was a few minutes late in oiling said wheels, that is, a few minutes after six o'clock A. M., at which time it was customary for the cable to start and for the first train to leave the power house. To oil said wheels it was necessary to remove a portion of the planking or covering directly over the wheels and get down between the spokes. Just after he had finished oiling them and had gotten out of said place, and was putting down the planks over said hole, Dawson, the superintendent, under whose management and immediate attention the road was operated, appeared in the doorway of the power house and angrily called out to him to let the planks alone and get the cars out. Brennan immediately left the work he was then engaged in, and, as

he had not yet placed the oil can on the dummy of the first train, which was then being pushed from the power house to the turn table to be turned and thence started down Front street, he rushed into the power house, caught up the oil can and ran out to the car, which had been turned and was being pushed by the gripman and the conductor toward the sheave wheels, as the cable could not be taken until beyond said wheels, and stepped on said dummy over the railing, arranged the can in place and stepped off the car, which was then directly over the hole so left uncovered by him when oiling the sheave wheels as aforesaid, and when he stepped from the car he fell into this opening and was crushed to death.

It thus appears that the deceased was well informed in the premises, and must have known the danger involved in stepping off the car with this man-hole, as it was called, left uncovered, and which he had left uncovered but a short time previously. Under such circumstances he was chargeable with contributory negligence, and there can be no liability on the part of the company to respond in damages for his death. For that reason it is unnecessary to consider the other points argued by the respondent.

It is contended by the appellant that the plaintiff ought not to be charged with contributory negligence in the premises because it appears that Dawson was a man of violent temper and turbulent disposition, and had discharged employes upon very slight provocation at various times, and that when he gave the order to Brennan to leave the hole uncovered and help get out the car he so engrossed the attention of deceased, and deceased so felt the necessity of immediate obedience, that in the hurry of attending to his other duties in the premises, he forgot all about leaving the man-hole uncovered; and should not be charged with negligence in so doing. But we cannot agree with this contention. It is admitted that the deceased was de-

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linquent upon the morning in question in not being at the power house on time to attend to his duties, and the fact that in the hurry of attending to the same, and in placing the oil can on the dummy car, he forgot all about having left this man-hole uncovered, cannot relieve him from the consequences of his own acts in the premises.

Therefore, the judgment of the superior court in granting the non-suit is affirmed.

DUNBAR, C. J., and STILES and ANDERS, JJ., concur.

HOYT, J., not sitting.

8	367
19	174

[No. 1097. Decided March 6, 1894.]

JAMES STEWART, *Appellant*, v. WILLIAM GOULD *et al.*,
Respondents.

CORPORATIONS — PROMISSORY NOTES OF — PLEDGE OF STOCK TO
SECURE — RIGHTS OF CORPORATION CREDITORS.

Although the note of a corporation may have been given without any consideration for its execution, a *bona fide* purchaser thereof for value, to whom certain shares of the capital stock of the corporation were assigned to secure its payment, is a corporation creditor.

Although a stockholder, after a pledge of any or all of his stock, is, under § 1509, Gen. Stat., authorized to represent the same at all meetings and vote as a stockholder, and although he is the owner and holder of the balance of stock remaining after such pledge, yet he would not be authorized to transfer or dispose of the property of the corporation to secure an individual indebtedness to the prejudice of corporation creditors.

Appeal from Superior Court, Clallam County.

George C. Hatch, for appellant.

Easterday & Easterday, for respondents.

The opinion of the court was delivered by

SCOTT, J.—The Clallam County Abstract & Trust Company was a corporation organized under the laws of this state, authorized, as expressed by the articles of incorporation, “to borrow money upon notes, bonds, etc., and to this end to give personal, collateral, real estate or other security.” From January, 1892, until June, of said year, all of the stock of the company belonged in equal amounts to R. A. Grimes, Horace White and B. F. Schwartz, who were, during said time, the trustees of said company; and said Grimes and White were respectively the president and secretary. On the 15th day of January, 1892, said company, by its president and secretary aforesaid, executed and delivered to Schwartz its promissory note for the sum of \$2,500, payable four months after date; and on the 5th day of February, 1892, said company, in like manner, executed and delivered to said Schwartz its certain other promissory note for a like sum, payable four months after its date. These notes were, on the 25th day of January, 1892, and on the 29th day of April, 1892, respectively, indorsed and delivered to the respondent Peters by said Schwartz. On the 3d day of September, 1892, Schwartz, to secure the payment of said notes, assigned to Peters 148 shares of the capital stock of said corporation and delivered to him two certificates evidencing Schwartz’ ownership of that number of shares. On the 3d day of October of said year Schwartz, being then personally indebted to appellant Stewart in the sum of one thousand dollars, undertook to pledge to him all of the property and effects belonging to said corporation as security for the payment of this personal indebtedness. On October 12th of said year respondent Peters commenced an action in the superior court of Clallam county on said notes, and attached all of said property, which, it is conceded, was of a less value

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than the amount due him, and in November of said year he recovered judgment against the corporation for an amount in excess of five thousand dollars. Schwartz was at the time insolvent. On the 14th day of October, 1892, appellant commenced this action, the object of which was to foreclose his alleged lien upon the property pledged to him as aforesaid, and on the 19th day of January, 1893, judgment was entered in said action for the defendants, from which he appeals.

It is contended by appellant that as Peters failed to show a transfer of said certificates of stock to him on the books of the company, Schwartz was the legal owner thereof under § 1509, Gen. Stat., and as he was the owner and holder of the balance of the stock, he was the equitable owner of the corporation's property, and had a right to dispose of it subject only to the rights of the corporation creditors; and he contends that Peters was not a creditor of the corporation for the reason that the notes which he held as aforesaid were given without any consideration.

It is further contended that the court erred in permitting the respondent to prove the recovery of said judgment, for the reason that he had not pleaded it in his answer. This point is immaterial, for his rights as a creditor of the corporation obtained under the notes, whether reduced to judgment or not, and although a stockholder after a pledge of the stock is, under § 1509 aforesaid, authorized to represent the same at all meetings and vote as a stockholder, he, although the owner and holder of the balance of the stock, would not be authorized to transfer or dispose of the property of the corporation to secure an individual indebtedness to the prejudice of the corporation creditors.

Appellant further contends that the court erred in not permitting him to show that the notes executed by the corporation to Schwartz were given without consideration, but

this point is not well taken, for there was no attempt or offer to show that the respondent Peters had not obtained said notes in good faith and for a valuable consideration, and that he was in a position where he could be charged with any notice of their invalidity.

There are some further points contended for by appellant, but they have been practically disposed of by what has been said before.

The judgment is affirmed.

DUNBAR, C. J., and HOYT, STILES and ANDERS, JJ.,
concur.

[No. 1135. Decided March 6, 1894.]

EDISON GENERAL ELECTRIC COMPANY, *Respondent*, v. THE
CANADIAN PACIFIC NAVIGATION COMPANY, *Appellant*.

FOREIGN CORPORATIONS—RIGHT TO TRANSACT BUSINESS—CON-
TRACTS—ACTION ON CONTRACT—INSTRUCTIONS.

Where a foreign corporation fails to register in compliance with the laws of a state, which merely impose a penalty for every day that business is carried on in the state without the corporation's having so qualified itself therefor, and there is no prohibition in the law against the transaction of business nor declaration that contracts entered into prior to such qualification shall be unlawful, the contracts entered into with such foreign corporation before it is authorized to transact business must be held binding.

In an action upon a specific contract to furnish materials and services in the construction of an electric lighting system, for which the defendant agreed to pay a certain price "when the work has been completed and found to be in good working order," an instruction was erroneous which charged the jury that if the contract had been substantially performed and the materials retained, the plaintiff was entitled to recover.

In such a case, an instruction was erroneous which told the jury, in substance, that, if the contract had been substantially performed, and was at the moment of its completion found to be in good working order, the plaintiff could recover, even although events suc-

8	370
34	98
5	370
142	191

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ceeding the completion of the work established the fact that the result accomplished was not that contemplated by the contract.

In such an action, it is not error to charge the jury that if they find for plaintiff they may include interest, as, the claim of the plaintiff being for a definite, liquidated sum, it would draw interest from the time of beginning the action.

It is not prejudicial error to refuse to give proper instructions in the language of requests therefor, when the court in other instructions substantially covers the same questions.

Where a contract contemplates the services of but one expert, the contractor cannot recover for the services of two experts which he put to work upon the job.

Appeal from Superior Court, King County.

Struve, Allen, Hughes & McMicken, for appellant.

Preston, Albertson & Donworth, and *Burke, Shepard & Woods*, for respondent.

The opinion of the court was delivered by

HORT, J.—This action was brought to recover for materials furnished and labor performed in pursuance of a written contract between the plaintiff and the defendant. Such contract was in substantially the following form:

This agreement made and entered into this 24th day of December, 1890, by and between the Edison General Electric Company, hereinafter called the "company," and the Canadian Pacific Navigation Company, Ltd., hereinafter called the "purchaser."

The terms and conditions of this agreement are such that the company agrees for the sum of three hundred and fifty (\$350) dollars, and in consideration of the mutual promises made below, to furnish the following apparatus and material necessary to change the existing electric light system on board the said purchaser's steamer "Islander" to conform to the Edison system as regards lamps and sockets: 220 Edison key sockets, 220 Edison 16 c. p. lamps, the necessary fittings required to fit with Edison sockets the existing chandeliers and brackets, the necessary wire to renew circuit in stokerroom.

The company will furnish the services of an expert to make the changes from the existing system to the Edison system, to overhaul the wires where necessary, for the sum of five (\$5) dollars per day from the time he leaves Seattle until his return, and the necessary living expenses while employed on steamer and during time enroute from and to Seattle, and traveling expenses from and to Seattle.

In case any material not included in this contract is desired, the purchaser agrees to give the company a written order for the same, and a charge for said extras is to be mentioned in said order.

In consideration of the above the purchaser agrees to pay the said company for all material and labor furnished under this agreement when the work has been completed and found to be in good working order.

The answer of the defendant put in issue many of the allegations of the complaint, and alleged by way of affirmative defense that the contract in question was made and to be performed in the province of British Columbia; that by the laws of said province a foreign corporation may register in the manner provided, and thus secure practically the rights of a domestic corporation as to the transaction of business in the province; that if it transact business in the province without having so qualified itself it shall incur a penalty not exceeding five dollars for every day during which business is so carried on; that plaintiff company was a foreign corporation, and had not in any manner complied with the provisions of such laws, and that by reason of such non-compliance the contract entered into was void. These facts were set out in detail in the answer so that the question of the validity of the contract under the laws of said province was fully presented. The court upon motion struck out one of the paragraphs of said defense, and its action in so doing is the first error assigned by appellant. This ruling had no effect upon ap-

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pellant's rights, and it is not necessary that we should decide as to its correctness.

The next error assigned is founded upon the action of the court in sustaining respondent's demurrer to this affirmative defense. It held that the terms of the law therein pleaded were not such as to make void contracts of foreign corporations that had not complied with its provisions. The only provision in the statute set out in the defense which tended materially to sustain the contention of the appellant was that in which it was provided that for every day that business was done by a foreign corporation without having complied with the statute it should pay a penalty as therein provided.

There is some diversity among the cases in the construction of laws of this kind, but the weight of authority seems to establish the doctrine that it is the duty of the courts to look at the whole statute, and therefrom determine as to what was the intent of the legislature. If by the terms thereof the act is made unlawful, it will usually be construed to amount to a prohibition of said act, and the imposition of a penalty will also amount to a prohibition if from the language used such seems to have been the intent of the legislature. But in the case at bar, while the company is liable to the penalty provided in the statute, there is nothing in the act which in terms prohibits the transaction of business, or declares it to be unlawful, and the particular language of the clause which imposes the penalty has no tendency to establish either of said propositions. On the contrary, its language fairly construed would seem to contemplate that the company might do business without such registration, but if it did it should pay the penalty therein prescribed for the privilege of so doing.

The cases cited by appellant, when applied to the facts of this case, have little tendency to sustain its contention. The investigation which we have been able to give to the

adjudged cases tends to support the statement made by respondent in its brief that a provision like the one under consideration has never been held to render contracts void, though entered into without the authority of the statute. Some of the cases cited by appellant contain expressions to the effect that the imposition of a penalty for the performance of an act is equivalent to declaring it unlawful, but an examination of the facts will show that the provisions which they were construing were clothed in far different language than the one under consideration. The demurrer was properly sustained.

The next error assigned is, that the court erred in giving the following instruction:

“If the jury believe and find from a preponderance of the evidence that the plaintiff furnished the materials and performed the work specified to be furnished and performed in the contract in suit, and in all respects substantially performed all the conditions on its part, and that the defendant retained said materials in its possession and made use of the same and of the fruits of such work performed, and did not return or offer to return said materials to the plaintiff, then the plaintiff would be entitled to a verdict of the jury for the amount of the contract price for said labor and materials specified in said contract.”

This error seems to us to be well assigned. There was nothing in the pleadings, or testimony, which justified the court in giving any instruction as to the retention by the appellant of the materials furnished and the fruits of the work performed under the contract, and such being the fact the instruction in regard thereto had a tendency to mislead the jury. By it they must have been led to suppose that there was some duty on the part of the defendant to have returned the materials if it wished to avoid liability. It is true that the first part of the instruction, which required that the plaintiff should establish the fact that it had substantially done all that was required on its

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part, was joined with what was said as to the retention of the materials by the conjunctive "and" instead of the disjunctive "or," and for that reason, in a technical sense, was perhaps not changed thereby to the prejudice of appellants, yet we are not prepared to hold that the jury necessarily have so construed it. They would be more likely to take the instruction as a declaration of the court that there was a duty resting upon appellant to return the property, if it would escape liability on account thereof. They would not be likely to assume that what was said about the retention of the property was idle talk on the part of the court.

Beside, when construed in the light of the contract as defined by the court in another instruction, this one is technically incorrect for the reason that by such other instruction the jury are told that if they find that the materials and work were furnished and performed as required by the contract, and that the work was completed and was then found to be or was in fact in good working order, the plaintiff will be entitled to a verdict; from which it will be seen that the court recognized the fact that not only must the contract have been substantially complied with, but that in addition thereto the work must have been found to be in good working order. Hence, the instruction under consideration, investigated in the light of the other, would warrant the jury in concluding that under the law the retention of the materials by appellant would be equivalent to a finding that the plant was in good working order. The jury are told in one of the instructions that, if the work has been substantially performed and the plant found to be in good working order, the plaintiff is entitled to recover, and in the one under consideration, that if the contract has been substantially performed and the materials retained, the plaintiff is entitled to recover. From the two instructions the jury may well have under-

stood that if the contract had been substantially performed, and the benefits thereof retained, the plaintiff could recover regardless of the question as to the plant being found in good working order. Any other construction of the language used would make the two instructions inconsistent.

The next instruction complained of was in the following language:

“If the jury believe and find from a preponderance of the evidence that the materials and work specified in the contract in suit were furnished and performed as required by the contract, and that work was completed and was then found to be, or was in fact, in good working order, then the plaintiff will be entitled to a verdict of the jury for the amount of the contract price specified in the contract, even if the light produced at subsequent times by the operation of the lamps furnished under the contract was not equal to 16 candle power light from each lamp. The defendant is not entitled, under the issues raised upon the pleadings in this action, to any reduction or abatement from the contract price specified in the contract merely by reason of inferior quality of the light produced by the lamps furnished, at times subsequent to the completion of the work, if the jury believe and find from a preponderance of the evidence that at the time of the completion of the work it was found to be in good working order.”

This instruction, in substance, told the jury that, if the contract had been substantially performed, and was at the moment of its completion found to be in good working order, the plaintiff could recover, even although events almost immediately succeeding the completion of the work conclusively established the fact that the result accomplished was not that contemplated by the contract. In so doing it construed that clause in the contract which provided that payments should not be made until the plant was found to be in good working order, to relate to its condition at the moment of completion. This was not a fair construc-

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tion of that clause in the contract. It was the evident contemplation of the parties that the work should not only be done as provided for therein, but that after it was done there should be reasonable opportunity given and time allowed to have it ascertained as a fact that the plant was found to be in such a condition as to fairly fulfill the object for which it was put in. The plaintiff occupied the position of an expert in determining what was necessary to make the plant perform the work required of it, and upon it was cast the responsibility, not only of putting in the material provided for in the contract, but also that of requiring the defendant to furnish such additional material as was necessary to make the plant reasonably fit for the use for which it was intended. The defendant did not profess any expert knowledge as to the plant to be put in, and relied entirely upon the plaintiff as to what was required. Under these circumstances the contract, when fairly construed, contemplated that there should be full opportunity by actual practical test to determine whether or not the plant was in good working order before the contract price therefor should be paid. This instruction did not put the matter to the jury in that light, and was, therefore, erroneous.

The next instruction as to which error is alleged, is one in which the court instructed the jury that if they found for the plaintiff they might include interest. The claim of the plaintiff was for a definite, liquidated sum, and from the time the action was brought we think it would draw interest, and that the court properly so instructed the jury.

The other errors alleged grow out of the modification by the court of one of the instructions asked by the defendant, and of the refusal to give various other instructions asked by it. In modifying the instruction in reference to the services of an expert the court committed error. The contract contemplated the services of only one expert, and

the plaintiff was thereby in no manner authorized to put two experts to work on the job, and recover for their services at the contract price.

Some of the instructions asked by the appellant and refused by the court correctly stated the law, but the court in other instructions given to the jury substantially covered the same questions, and for that reason it was not reversible error to refuse to instruct in the language of the requests.

The judgment must be reversed, and the cause remanded for a new trial.

DUNBAR, C. J., and STILES, SCOTT and ANDERS, JJ.,
CONCUR.

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[No. 1140. Decided March 6, 1894.]

THE CITY OF VANCOUVER, *Respondent*, v. A. E. WINTLER *et al.*, *Appellants*.

MUNICIPAL CORPORATIONS—PASSAGE OF ORDINANCES—STREET IMPROVEMENTS—ACTION TO ENFORCE ASSESSMENTS—COUNTERCLAIM—ILLEGAL ASSESSMENT.

Sec. 635, Gen. Stat., governing the passage of laws by the council in cities of the third class, applies to all ordinances of every kind and for every purpose.

The passage of an ordinance on the day it was reported to the city council by the city attorney, to whom it had been referred, does not invalidate the ordinance, under the provisions of § 635, Gen. Stat., when such ordinance is merely a substitute for one introduced more than five days prior to its passage, and the substitute falls clearly within the limits of the subject matter of the original proposition.

In an action by a city to foreclose a lien for a street assessment, the defendant cannot set up a counterclaim for the value of a strip of land which it was alleged had been taken possession of by the city and improved for street purposes.

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When the boundaries of a city have been extended it has power to improve a highway falling within its limits which had been opened as a county road.

Under the statute conferring power upon cities of the third class to make street improvements and assess abutting property, and an ordinance of the city of Vancouver passed pursuant thereto providing that when the city council shall have contracted for the improvement of any street "the cost and expense of such improvement shall be assessed upon the lots and land fronting thereon," property which has been rendered liable for an improvement ordered on a portion of a street cannot be subjected to an additional liability for a continuation of the improvement on another part of the street, made under another contract, although the property thus sought to be subjected has received benefits under the second contract.

Where an assessment against property for street improvement is illegal for the reason that it seeks to charge the property with the cost of improvements for which it is not liable, there can be no recovery, in an action to foreclose such assessment, of the amount that is properly chargeable against the property.

Appeal from Superior Court, Clarke County.

Bronaugh, McArthur, Fenton & Bronaugh, E. C. Bronaugh, and N. H. Bloomfield, for appellants.

E. E. Coovert, for respondent.

The opinion of the court was delivered by

STILES, J.—The respondent, a city of the third class, seeks in this action to foreclose certain liens for street assessments against parcels of land abutting on the street and owned in severalty by the appellants. There were originally three separate actions, but under stipulation they came up as one case.

1. The first point made by appellants is, that the general ordinance governing street assessments was void because not passed in the manner required by the statute. The law governing the passage of ordinances is contained in Gen. Stat., § 635, the first clause of which is:

"No ordinance, and no resolution granting any franchise for any purpose, shall be passed by the city council on the

day of its introduction, nor within five days thereafter, nor at any other than a regular meeting, nor without being first submitted to the city attorney.”

The respondent has deemed it important to claim, and argue at length, that the provision applies only to ordinances and resolutions granting franchises; but we think the position is untenable. It is the only provision in the act, of which it was a part, governing the matter of the passage of laws by the council, and the last clause of the section, which relates to the number of votes required to pass any ordinance, resolution or order, clearly shows an intention to make a general application of the whole section to all ordinances of every kind and for every purpose.

But the complaint of the appellants is that, although more than five days elapsed between the introduction of ordinance 242 and its passage, the original ordinance was not passed, but a substitute reported by the city attorney. It is a well-known practice of legislative bodies to proceed in this manner, and so long as the substitute is clearly within the limits of the subject matter of the original proposition we see no reason why municipal councils should not proceed in the same way. It is a mere method of amendment, and if the changes made are such as might have been brought about by ordinary amendments the statute is not infringed. This was the case with the ordinance in question, and it was therefore properly passed.

2. The appellants claimed, by way of counterclaim, that the respondent had gone beyond the legal limits of the street (conceding that there was a street at all), and had taken possession of and improved about ten feet in width of their land; and they sought to recover the value of this strip in this action. The court struck out the counterclaim, and error is assigned thereon. We concur with the lower court in its action on this matter. There was no law in force by which municipal corporations could acquire land

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for streets by any other method than bargain and sale. *Tacoma v. State*, 4 Wash. 64 (29 Pac. 847). It could not do so by committing a trespass and permitting itself to be sued for the value of the land, any more than could a private individual. *Green v. Tacoma*, 51 Fed. 622.

If the strip of land belonged to the appellants it belongs to them still, and they can recover it, with damages for the trespass, in a proper action.

3. We think there was sufficient evidence before the court to warrant its finding that a highway sixty feet wide had been opened as a county road, and that the city was authorized to improve it, when the boundaries were extended. *Town of Sumner v. Peebles*, 5 Wash. 471 (32 Pac. 221).

4. The assessment sought to be foreclosed was one for the improvement of Main street, from Eighth street to the V. K. & Y. R. R. track, a distance of about twenty blocks, and consisted of grading and sidewalking. The council, on March 21, 1892, adopted a resolution ordering the improvement of the street from Fifteenth street northward to the railroad track. April 25th a contract was entered into with Hayden & Conklin for the grading, and with D. B. Wood for the sidewalk, and the work went on to completion in due time. This part of the improvement fronts upon appellants' land, and the contract price of the grading was $8\frac{1}{2}$ cents per cubic yard for cut and fill, making a total of \$1,249.56. June 23d the council ordered a similar improvement to be made in that part of Main street between Eighth and Fifteenth streets, and on July 16th a contract was made between the city and one White for this new work, at $14\frac{1}{2}$ cents per cubic yard for cuts, and 14 cents for fill. The contract of Hayden & Conklin required them to bring the roadway of their portion of the street to the established grade, and the specifications provided that they should deposit earth for fills in layers of not exceed-

ing one foot, and fill up shrinkage free of cost. Their work was finished and accepted before the work on White's contract was commenced. White's part of the street seems to have required much more excavation than fill, so that there was an excess of 7,489 yards of gravel to be disposed of. The eighteenth specification under his contract read:

"The contractor will deposit the surplus excavation at such places and in such manner as the engineer may direct, within 4,000 feet of the point of excavation, and will receive therefor the same price per cubic yard as for street embankments."

Without any order from the council therefor, the chairman of the street committee and the engineer directed White to spread the surplus gravel from his excavations in Main street, as well as 2,536 cubic yards taken from side streets, where approaches to Main street were made, over the surface of the street covered by Hayden & Conklin's contract; thus raising the surface of the street from twelve to eighteen inches. By this course two things were accomplished, viz., a better surface for the street was made, and a convenient way of disposing of the surplus gravel was provided. No assessment was levied for the improvement under the Hayden & Conklin contract; but after White had finished his work one assessment was made for the whole improvement from Eighth street to the railroad, the cost of the White graveling, some \$1,400, being added to the \$1,249.56 paid to Hayden & Conklin for their grading between Fifteenth street and the railroad.

Appellants complain of this on the ground that they should not be charged for any work but that which was ordered done under the Hayden & Conklin contract; that under neither order of the council was the work of graveling their part of the street contemplated; and that the city's officers had no authority to direct White to do any work, graveling or otherwise, north of Fifteenth street.

Mar. 1894.] Opinion of the Court — STILES, J.

The city justifies its action by claiming that the improvement was a continuous one, running from Eighth street, and that it had a right after all the work was done to determine that the benefit from the heavy excavation under the White contract was chargeable to the property north as well as south of Fifteenth street, although the orders for the improvements and the contracts therefor were distinct. It is also argued in its behalf that, now that the graveling has been done, and a confessedly better street made, property owners ought not to be permitted to shirk a just liability for payment of the cost.

The law permitting cities of the third class to make street improvements and assess abutting property therefor is very summary. Without petition and without opportunity for remonstrance, the vote of four members of the council is sufficient to order the most elaborate improvement, and tax the property owner therefor, no matter how unreasonable in point of fact the work may be. It is not to be wondered at, therefore, that municipal corporations exercising such powers are held to a somewhat strict adherence to the letter of the laws they are permitted both to make and to execute. The statute is a mere skeleton conferring the power, with meager details, and leaving it to the corporate authorities, by ordinance, to make rules and regulations for ordering improvements, entering into contracts and levying assessments. Whether, under the general charter of cities of the third class, two independent improvements of the kind here involved could be joined together in one assessment it is not now necessary to decide; but it is clear that under the law governing the respondent city's action, ordinance 242, no such thing can be done. Section 1 reads: "When the city council shall have ordered or contracted for the improvement or repairing of any street . . . the cost and expense of such improvement shall be assessed upon the lots and lands

fronting *thereon*," meaning "fronting the improvement," as it is in terms expressed in § 4. The remainder of the ordinance provides the machinery by which the cost shall be assessed, through the agency of a board of appraisers, consisting of the council committee on streets and the city engineer and assessor. To the council is reserved the power to hear objections to the assessment, and to amend and revise it, "so as to render the same fair and equitable," before it is placed in the hands of the treasurer for collection.

This ordinance, fairly interpreted, requires that when an improvement is ordered by vote of the council, the property fronting on the street within the limits of the proposed improvement, and none other, be assessed for the cost. It is also implied (and therein it merely accords with the general rule of law), that no assessment shall be made upon property to pay for alleged improvements where the council did not, in the manner required by the statute and by ordinance 242, acquire jurisdiction of the matter by duly ordering the specific improvement to be made for which an assessment is sought to be levied. But, in the case before us, only one order was ever made by the council for the improvement of Main street from Fifteenth street north to the railroad, and that was for grading it to a grade established by a former ordinance. A contract was made with Hayden & Conklin for this work, which they performed to such an extent that it was accepted and paid for, and for the expense thus incurred the city had a right to levy an assessment.

Excuse is sought for adding the cost of putting gravel on the street by the allegation that Hayden & Conklin's fills had settled so that in places the surface was below grade; but if the fact be so, the answer is that their contract provided that they should make good any such shrinkage at their own expense, and if the city has not

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held them to their agreement it cannot expect to recover from property owners for what it ought to assess to other property under another order and another contract. If it was intended to gravel the northern end of the street with material to be derived from White's excavations, it should have been so declared in the resolution of intention. But what was ordered was that Main street should be graded and sidewalked between Eighth and Fifteenth streets, and under ordinance 242, when the assessment came to be made, only property fronting on that improvement could be charged with the cost thereof. Owners of other property would have no reason to expect that they would be assessed and would naturally pay no attention to the matter, although surplus earth or gravel might be deposited in front of their property for the convenience of the contractors.

It was a part of the contract with White that he should receive in payment of his work the assessment upon the property made liable by law to pay its proportion of the cost and expense of making the improvement contracted for by him (in addition to what the city should pay for street intersections), and that he would make no claim and wage no suit against the city for anything further; he, therefore, would have had a right to have the sum due him assessed upon and collected from the property which he improved, viz., that between Eighth and Fifteenth streets. This merely illustrates the situation, for White seems to have been paid out of the city treasury; but it serves to show that when the contract was made the city authorities had no expectation that his compensation would be derived from any property north of Fifteenth street.

There has been such a confusion of property and charges in the attempted assessment that it can only be said that it is not a legal assessment at all, and we must hold the attempt to charge the appellant's property void. In a pro-

ceeding to foreclose an assessment by suit, large latitude will be allowed if jurisdiction has once attached; but the right of the city to recover depends finally upon an assessment of the property legally chargeable for the improvement ordered, and that has not been produced. The courts cannot make an assessment where the authorities of the city have, in the most material matters, failed to make one. For this reason even the amount which appellants ought justly to pay cannot be recovered in this action.

Judgment reversed, and cause remanded for dismissal.

DUNBAR, C. J., and ANDERS, J., concur.

HOYT and SCOTT, JJ., dissent.

ON PETITION FOR RE-HEARING.

STILES, J.—The respondent asks a modification in the disposition of this case, so that it may be allowed to recover the amounts properly chargeable against lots or tracts as they may be found located between Eighth and Fifteenth streets, and between Fifteenth street and the railroad. The amendment to § 124 of the act of 1890 (Laws 1893, p. 159), is appealed to for this relief, but although the last clause of the section as amended is very liberal in permitting a recovery, notwithstanding irregularities and defects in assessment proceedings, it has no application to cases where there has been no assessment at all, as is the fact here, for what purported to be an assessment was not, in fact, such, but was an arbitrary attempt, notwithstanding the clear provisions of the ordinance, to confuse two independent matters, having no connection with each other. It would be grossly inequitable and unjust to compel property owners to submit to the cost and expense of defending suits merely to reduce assessments to the proper amount when the city authorities have not laid even the foundation of a levy, which is necessary to the jurisdiction of both the corporation and the court.

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Ch. 95 of the Laws of 1893 seems to be intended to point out a way by which respondent can secure its just rights against the property of appellants.

DUNBAR, C. J., and ANDERS, J., concur.

[No. 1176. Decided March 6, 1894.]

THE CITY OF SEATTLE, *Appellant*, v. WILLIAM H. SMITH
AND ELIZABETH SMITH, *Respondents*.

FORECLOSURE OF STREET ASSESSMENT—EVIDENCE—PRESUMPTION
OF REGULARITY OF PROCEEDINGS.

In an action by the city of Seattle to foreclose a street assessment, under §§10 and 95, Laws 1885-86, pp. 243, 268, the assessment roll is *prima facie* proof of the regularity of all proceedings prior to the levy of the assessment, and the want of notice to property holders that the improvement was to be made is matter of defense.

Appeal from Superior Court, King County.

George Donworth, and *James B. Howe*, for appellant.

Tustin, Gearin & Crews (*C. W. Turner*, of counsel), for respondents.

The opinion of the court was delivered by

STILES, J.—Plaintiff city appeals from a judgment of non-suit entered in a suit to foreclose a street assessment. At the proper time counsel offered in evidence the assessment roll, but its admission was objected to on the ground that evidence had not been produced that notice of the proceedings leading up to the assessment had been given to property owners. After counsel had stated that they did not intend to follow up the introduction of the roll with evidence showing notice, the court sustained the objection.

Unless there are statutes which obviate the necessity of strict proof, the general rule is that tax and assessment cases must be proven by showing a compliance with all of the requirements leading up to the levy of the assessment. But in this instance there was such a statute, viz., § 95 of the charter of Seattle, Laws 1885-6, p. 268, reading:

“In any action, suit or proceeding in any court concerning any assessment of property or levy of taxes authorized by this act, or the collection of any such tax, or proceeding consequent thereon, such assessment, levy, consequent proceeding and all proceedings connected therewith, shall be presumed to be regular and duly done or taken, until the contrary is shown.”

The practical effect of this law, the validity of which is not questioned here, is to supplement § 10 (Laws 1885-6, p. 243) of the same act, and make it necessary for the city, in an assessment foreclosure, to go no further than the production of a roll regular on its face, in order to make a *prima facie* case. All defects in the proceeding are to be established by the defense. In *Town of Elma v. Carney*, 4 Wash. 418 (30 Pac. 732), this ruling was foreshadowed, although the point as to the proof was not directly involved.

Seattle v. Doran, 5 Wash. 482 (32 Pac. 105), is somewhat relied upon by the respondents, growing out of the citation of *Pittsburg v. Walter*, 69 Pa. St. 365. The latter case sustains the general rule, in the absence of statutes, as above mentioned. But in *Seattle v. Doran* the city was attempting to recover under § 10, in face of the fact that the offer of the original assessment roll had been refused by the court for some reason. The brief stated: “The original assessment roll offered by plaintiff . . . and which, under a recent decision of this court in *Town of Elma v. Carney*, would have *prima facie* entitled the plaintiff to a decree, was excluded by the court;” and no point was made by either side upon this action.

Mar. 1894.] Opinion of the Court—SCOTT, J.

The judgment must be reversed, and the cause remanded for a new trial. So ordered.

DUNBAR, C. J., and HOYT, SCOTT and ANDERS, JJ.,
concur.

[No. 1179. Decided March 6, 1894.]

THE UNION WHARF COMPANY, *Respondent*, v. ISRAEL
KATZ, *Appellant*.

TIDE LANDS—RIGHT TO PURCHASE—APPEAL FROM STATE BOARD
OF EQUALIZATION—NOTICE.

Notice of appeal to the superior court from the decision of the state board of equalization on a contest between applicants for the purchase of tide lands must, under §§ 2170, 2171, Gen. Stat., be filed with said board within ten days after the rendition of the decision appealed from.

Appeal from Superior Court, Jefferson County.

W. F. Rupert, for appellant.

A. R. Coleman, and *C. A. Burnett*, for respondent.

The opinion of the court was delivered by

SCOTT, J.—The appellant and respondent each made application to purchase a certain tract of tide lands under the provisions of the act approved March 26, 1890 (Laws, p. 431), and the state board of equalization, on a contest between said parties in relation thereto, decided in favor of the respondent. On the eighth day following this decision the appellant caused a notice of appeal to the superior court of Jefferson county to be served on the respondent. This notice was not filed with said board of equalization until more than ten days had elapsed after

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said decision, and the superior court dismissed the appeal on the ground that it had no jurisdiction because the appeal was not taken or perfected within the ten days allowed by the statute; whereupon an appeal was taken from that decision to this court.

Appellant contends that it was only necessary to serve the notice of appeal within said period of ten days, and that he had a reasonable time thereafter within which to file same with the state board of equalization. It is questionable whether § 2170, Gen. Stat., the statute in question, is sufficiently definite in the matter of taking an appeal from said board to the superior court to render it effective. However this may be, we are satisfied, especially in view of the next section, that the state board of equalization must have notice of the appeal within ten days after the decision is rendered, for it is made the duty of said board by said section, in case no appeal is taken, to certify to the commissioner of public lands their findings, upon receipt of which said commissioner is required to deliver a certificate of purchase to the parties entitled thereto, and only ten days are allowed within which an appeal can be taken under the preceding section.

Affirmed.

HOYT and STILES, JJ., concur.

DUNBAR, C. J., and ANDERS, J., not sitting.

[No. 1100. Decided March 7, 1894.]

F. L. STINSON, *Respondent*, v. MORRIS B. SACHS, *Appellant*.

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PRINCIPAL AND AGENT—PROMISSORY NOTE PAYABLE TO AGENT—
NECESSITY FOR ENDORSEMENT TO PRINCIPAL—AUTHORITY OF
AGENT—CHALLENGE TO JUROR—PRACTICE—RECORD ON AP-
PEAL.

Where an agent takes a promissory note payable to himself, his principal may sue on it without any endorsement.

An agent employed by the general soliciting agent of an insurance company to solicit insurance has no implied power to bind his principal by contracting with another for the rendition of similar services.

The ruling of the trial court permitting plaintiff to file a reply on the same day that defendant moves for judgment on the pleadings because of failure to reply, will not be disturbed, when there is no showing of abuse of discretion.

It is ground of challenge to a juror when he states that he knows one of the parties and would believe his statement of a fact when it was contradicted only by the statement of some witness whom he did not know.

Although a transcript on appeal may be properly certified, yet where the bill of exceptions accompanying it is a detached paper, without authentication, the supreme court will ignore the errors shown in the bill.

Appeal from Superior Court, Jefferson County.

George H. Jones, for appellant.

Robert W. Jennings, for respondent.

The opinion of the court was delivered by

STILES, J.—Appellant's answer admitted the execution of the note sued on, and its delivery to the payee, Marston, but denied its endorsement to the respondent. As part of an affirmative defense it was also set up that in taking the note, which was given in payment of a life insurance premium, Marston was acting as the agent of respondent, who

seems to have been the general soliciting agent of the insurance company. The evidence established this fact clearly, and thereby obviated the point which appellant makes that no sufficient proof was offered as to the endorsement; for if Marston was respondent's agent, and took the note payable to himself, respondent could sue on it without any endorsement, since it was his note and not Marston's. The answer fully supplied what might have been defects in the complaint, in that it did not state the agency and allege the real payee to be respondent.

Appellant counterclaimed for services alleged to have been rendered by him, at Marston's request, as the agent of respondent, and gave testimony to sustain his demand; but he did not show any authority in Marston to bind respondent to a contract covering such services, and respondent's testimony was that Marston had no such authority. It was incumbent upon appellant to show the existence of such authority when it was challenged, as the services were not such as come within any implied authority of a mere soliciting sub-agent. The court withdrew the counterclaim from the consideration of the jury, and it could not have lawfully done otherwise.

The condition of the case left no defense to the note. The principal points made are all covered by the disposition of the case here made. A point is made that the court refused to grant defendant's motion for judgment on the pleadings, because a reply was not filed within one day after service of the answer containing a counterclaim. The demand for this action seems to have been based on a rule of court which is not contained in the record, and of the existence of which we are not, therefore, advised. However, the court, upon what seemed to it good grounds, permitted the reply, which was filed on the same day as the motion, to stand, and we should not interfere with its action in that respect.

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Syllabus.

Two jurors were excused by the court because they answered that they were friends of the defendant and would believe his statement of a fact when it was contradicted only by the statement of some witness whom they did not know. Jurors have no right to let their personal knowledge of a witness weigh one way or another in their determination of a case put before them; therefore, upon the answers of these jurors they were properly excluded.

We must advert to the condition of the record in this case. The transcript comes here properly certified by the clerk, excepting that the bill of exceptions is a detached paper, without authentication, and in exceedingly bad order. The bill mentions several exhibits but one of which appears, and that one a mere loose paper without identification of any kind beyond an unsigned pencil memorandum. This court cannot accord verity to such records, and would not have reversed the judgment in this case, even had error been shown, except as it might have been found in the part of the transcript covered by the certificate. Acts, 1893, p. 126, § 14.

Judgment affirmed.

DUNBAR, C. J., and SCOTT, HOYT and ANDERS, JJ.,
concur.

[No. 1082. Decided March 9, 1894.]

E. HAMMER, *Respondent*, v. JAMES O'LOUGHLIN AND
THOMAS COSTELLO, *Appellants*.

BILL OF SALE AS CHATTEL MORTGAGE—EVIDENCE.

Where, at the time of the execution of a bill of sale by a debtor to his creditor the undisputed proof shows that there was no reservation of any right to the property or to the proceeds thereof by the vendor, the presumption that the instrument is a bill of sale and not a chattel mortgage is not overcome by testimony that the

purchaser admitted that if he made more out of the property than would pay the total amount due him he would be willing to pay the overplus to his vendor; nor by testimony showing that after the execution of the alleged bill of sale the purchaser took a mortgage on other property of the vendor as security for any deficit remaining after the application to his debt of the proceeds of the property covered by the bill of sale; and that at another time he sought to get money from the vendor in reduction of the amount of such indebtedness.

Appeal from Superior Court, Skagit County.

Million & Houser, and Frank Quinby, for appellants.

J. Henry Smith, and Moore & Pittman, for respondent.

The opinion of the court was delivered by

Hoyt, J.—Appellants' claim to the property in question is founded upon a levy thereon by virtue of a writ of attachment against the firm of Larson & Luddington. Respondent claims title by virtue of a bill of sale from said Larson & Luddington, executed and recorded before the levy of the attachment, and it is conceded that respondent was entitled to judgment if such bill of sale was to have force as such. It is contended, however, that it was given only as security, and that it should be construed as a chattel mortgage.

The testimony given by the respondent in relation to the circumstances under which the bill of sale was given, and the object and effect thereof is in no manner contradicted by the proofs offered by appellants. The substance of such testimony was that he was the owner of the property by virtue of a sale to him evidenced by said bill of sale; that the firm was indebted to him for a large sum of money, and was responsible for the obligations of certain of the men in its employ; that the property was sold to him for the purpose of paying such indebtedness, and if sufficient proceeds could be derived therefrom, also paying the obligations of the men. Such testimony directly nega-

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tived any idea on the part of the parties to the sale that any right to the property or to any of the proceeds thereof was retained by those who made the bill of sale. Such being the fact, there was nothing in the transaction which would change the presumption that the bill of sale was what it purported to be.

But few circumstances are relied upon by the appellants to overcome this testimony: One is that the respondent admitted at one time that if he made more out of the property than would pay the total amount due to him he would be willing to pay the overplus to Larson & Luddington; but such admission had no tendency to establish the fact that prior to or at the time the bill of sale was made there was any such understanding as between him and the makers thereof.

It also appeared from the evidence that after the making of said bill of sale respondent took a mortgage on a team as security for any amount which might remain unpaid after the application of the proceeds of the property covered by the bill of sale, and that at one time he sought to get some money of said Larson & Luddington by way of a loan, or in reduction of the amount of their indebtedness.

In our opinion these circumstances were not sufficient to overcome the presumption growing out of the execution of the bill of sale, and the undisputed proof that at the time it was executed there was no reservation of any right to the property or to the proceeds thereof by said Larson & Luddington.

The judgment must be affirmed.

DUNBAR, C. J., and SCOTT, STILES and ANDERS, JJ.,
concur.

[No. 1223. Decided March 9, 1894.]

E. M. HUNT, *Appellant*, v. A. V. FAWCETT *et al.*, *Respondents*.

COUNTY INDEBTEDNESS — RATIFICATION — FUNDING BONDS — POWERS OF COMMISSIONERS.

The valuation of property in a county for the purposes of state and county taxation becomes fixed and certain, not upon the adjournment of the county board of equalization, but upon the completion of the equalization of values by the state board.

Under Laws 1893, p. 181, §1, provision is made for the ratification of such invalid county indebtedness only as was incurred prior to March 9, 1893, the date that said act took effect.

The joinder in one proposition for submission to the voters for ratification of indebtedness which cannot be validated with that which may be vitiated and renders nugatory the entire proceeding.

Under Laws 1893, p. 181, §2, a proposition submitted to the voters of a county for the purpose of ratifying its invalid indebtedness is illegal, when it does not specify the dates at or between which the different items of indebtedness were attempted to be incurred.

Where county commissioners are authorized to issue bonds for funding indebtedness without an election being held therefor, the fact that the bonds are issued pursuant to an election will not affect the validity of the issue.

A county is not authorized, under Laws 1889-90, p. 37, §3, after it has reached an indebtedness of one and one-half per cent. of the assessed valuation of its property, to borrow money upon an issue of bonds voted by the people and apply any of the proceeds to the redemption of its outstanding warrants within the one and one-half per cent. limit, for the purpose of issuing new warrants in their stead for current expenses.

The payment of a commission to the purchaser of county bonds is contrary to the provisions of the statute prescribing that such bonds shall not be sold at less than their par value. (HOYT, J., dissents.)

(STILES, J., dissents.)

Appeal from Superior Court, Pierce County.

Alfred E. Buell, for appellant.

Snell & Bedford, for respondents.

8	396
13	705
14	68
8	396
15	89
8	396
26	233
8	396
e42	301
e42	302

The opinion of the court was delivered by

ANDERS, J.—The appellant, a taxpayer of Pierce county, by this action seeks to restrain the respondents, as the board of county commissioners of said county, from issuing negotiable five per cent. twenty year bonds of said county in the sum of \$300,000, or delivering the same to the Imperial Loan & Trust Company, a corporation, in pursuance of a contract of sale entered into between said board of commissioners and said company. The respondents demurred to the complaint, and their demurrer was sustained by the court and the action dismissed.

It appears from the complaint, the material allegations of which are admitted by the demurrer, that between the 12th day of September, 1892, and the 3d day of May, 1893, inclusive, the board of county commissioners of Pierce county entered into contracts for finishing and furnishing the new court house, and thereby attempted to incur indebtedness against said county to the amount of \$42,298.60, and during the same period of time, issued warrants on the general fund for current expenses to the amount of \$68,028.32. At the time this indebtedness was so attempted to be incurred, the indebtedness of the county had already reached the limit of one and one-half per cent. of the taxable property therein, and the attempted indebtedness in question had not been assented to by three-fifths of the voters voting thereon at an election held for that purpose, and was, therefore, invalid. Const., art. 8, § 6.

On May 17, 1893, the board of commissioners of said county passed a resolution to submit to the voters of the county the question of validating the aforesaid attempted indebtedness at an election to be held on June 20, 1893, in accordance with the provisions of the act of March 9, 1893 (Laws 1893, p. 181), and also the further question of authorizing the said board of county commissioners to

issue negotiable bonds of said county in the amount of \$300,000, above the limit of one and one-half per cent. indebtedness allowed by the constitution to be incurred by the commissioners for the purpose of procuring money to fund outstanding warrants so as to reduce the indebtedness incurred by the commissioners below the said limit, said bonds to draw five per cent. annual interest and to be payable in gold coin in twenty years from date thereof.

Pursuant to the foregoing resolution, an election was held on June 20, 1893, at which three propositions were submitted to the voters, as follows: (1) To validate the court house contracts entered into between September 12, 1892, and May 3, 1893. (2) To validate warrants issued between those dates. (3) To authorize the commissioners to issue \$300,000 of five per cent. gold bonds, above the limit allowed by law to be incurred without a vote of the people, for the purpose of procuring money to fund outstanding warrants. Each of these propositions received the assent of more than three-fifths of the voters at said election.

On November 11, 1893, the commissioners entered into a contract with the Imperial Loan & Trust Company, which, upon certain conditions therein specified, binds the Trust Company to take bonds in the sum of \$300,000 at par and accrued interest, and by which the county is bound to pay the company the sum of \$14,750, "as and for expenses and commissions." These bonds recite upon their face that they are issued under the county funding act of March 21, 1890, and in pursuance of the election held on June 20, 1893. The commissioners are proposing to sell the bonds under this contract and to use the proceeds to pay outstanding warrants, some of the warrants to be paid being part of the indebtedness attempted to be validated, and then to incur further indebtedness under the claim that this \$300,000 debt must not be reckoned in estimating

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the one and one-half per cent. limit which may be incurred without the assent of three-fifths of the voters of the county.

It appears from the pleadings that only such indebtedness as was incurred after the assessment of 1892 became operative was invalid, and it therefore becomes important to ascertain that date. It is claimed by the appellant that it was the 20th day of August, 1892, because upon that day the county board of equalization adjourned and the rolls were footed. But we are of the opinion that said assessment did not take effect until October 15, 1892. On that day the work of the state board of equalization was completed, and then, and not until then, did the value of the property in the county, for the purposes of state and county taxation, become fixed and certain. See *Culbertson v. Fulton*, 127 Ill. 36 (18 N. E. 781).

It must be conceded that all indebtedness attempted to be created against the county by the commissioners, after the assessment of 1892 became effective, was void, because the then existing indebtedness of the county was greater than one and one-half per cent. of the value of the taxable property therein, as shown by that assessment. This void indebtedness could only be made valid by legislative authority (*Rehmke v. Goodwin*, 2 Wash. 676, 27 Pac. 473), and such authority was granted by the act of March 9, 1893. Laws 1893, p. 181. Was it, or any part thereof, validated by the election of June 20, 1893, which was held for that purpose? The respondents contend that all of the indebtedness attempted to be created by them, not only before but after March 9, 1893, and up to and including May 3, 1893, was thereby ratified and thenceforth became, and now is, a legal obligation of the county. On the other hand the appellant insists — (1) That all indebtedness attempted to be created after March 9, 1893, when the validating act took effect, was not, and could not be, vali-

dated, and (2) that the joinder of this indebtedness which could not be validated with the indebtedness incurred prior to the passage of the statute, in the propositions submitted to the voters at the election, vitiated and rendered nugatory the entire proceedings.

We entertain no doubt of the correctness of appellant's first proposition. The first section of the statute conclusively settles that question, for it is therein provided that—

“Any county in this state may ratify, in the manner prescribed in this act, the attempted incurring of any indebtedness of such county by the issuing of warrants, making of contracts or creation of other evidences of indebtedness on the part of such county by the board of county commissioners or other officers of such county at any time prior to the time when this act shall take effect,” etc.

This statute is essentially a curative statute, and is only operative upon past transactions. It grants no license to create debts, but it provides in clear and explicit language, the only method whereby indebtedness honestly attempted to be created for legitimate purposes may be ratified; and an examination of its provisions constrains us to yield our assent to appellant's second proposition also, and to conclude that none of the indebtedness attempted to be incurred has been legally ratified.

The second section of the act under consideration provides that—

“Whenever the board of county commissioners of any such county shall deem it advisable that the ratification authorized by this act shall be obtained, they shall provide therefor by resolution, which shall specify separately the amounts of each distinct class of such indebtedness proposed to be ratified, with the date of the attempted incurring thereof, or, if any such class shall be composed of more than one item, the dates between which the different items were attempted to be incurred, and the general nature of the indebtedness comprised in each such class.”

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Now, while the submission to the voters in this case specified the different *classes* of indebtedness proposed for ratification, it failed to specify the dates at or between which the different items of indebtedness were attempted to be incurred, or the dates of the attempted incurring of any distinct class capable of ratification. It is claimed, however, on behalf of the respondents, that the indebtedness attempted to be contracted prior to March 9, 1893, was certainly ratified even if that created subsequently was not. But it is a sufficient answer to that contention to say that no such proposition was submitted or voted upon; and besides, to hold that the indebtedness contracted between September 12 and March 9 was ratified, and the balance not ratified, would be to create a class of indebtedness not specified in the resolution of the commissioners. It may be true that the indebtedness attempted to be incurred before March 9 can be separated from that which was attempted to be incurred after that date, but we have no means of knowing that the electors would have ratified the former if it had been separately submitted to them. It is certainly true that the voters of Pierce county have never voted to validate that indebtedness, and until they have so expressed themselves the indebtedness is void.

The appellant further contends that the county funding act of March 21, 1890 (Laws 1889-90, p. 37), gives no authority to hold an election to authorize the issuing of bonds for funding purposes; and we concede that no such power is thereby expressly given. Under that act valid indebtedness may be funded without a vote of the people. *Murry v. Fay*, 2 Wash. 352 (26 Pac. 533).

But it does not follow that, because county commissioners are authorized to issue bonds for certain purposes whenever they may deem it advisable to do so, without first submitting the question to a popular vote, bonds issued for the same purposes are necessarily rendered invalid by

reason of the fact that their issuance was in accordance with the will of the voters as expressed at a formal election. That merely doing more than is necessary to accomplish a particular thing will not destroy the effect of that which it was necessary to do, is a self-evident proposition.

If, therefore, the bonds in question were designed merely to fund valid existing indebtedness contracted under §§ 1 or 2 of the funding act, their validity could not be successfully questioned. Nor are they invalid if issued for the purpose of procuring money for any other strictly county purpose, under the provisions of § 3 of that act. And the respondents claim that the purpose for which they propose to issue them is a strictly county purpose. That may be technically true, but we fail to find anything either in the constitution or the statutes authorizing them to treat these bonds, if issued and sold, as constituting no part of the amount of the one and one-half per cent. of the taxable property of the county, to which the commissioners are limited in contracting indebtedness at their own discretion.

It is plainly stated in § 2 of the funding act, that the entire indebtedness of any county shall not exceed in amount five per centum of the taxable property therein, and the language of the constitution is equally explicit. Art. 8, § 6. Under our law, whenever the *existing indebtedness* of a county, whether evidenced by bonds or warrants, reaches the one and one-half per cent. limit, no further debts can be contracted without the assent of three-fifths of the voters of such county at an election held for that purpose. It follows, therefore, that the claim of the respondents that they have a right to dispose of these or any other bonds and use a part or all of the proceeds to redeem the indebtedness of the county evidenced by outstanding warrants below the one and one-half per cent. limit, and then issue other warrants to pay current expenses until the amount of such warrants equals said limit, is utterly without foun-

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Dissenting Opinion—STILES, J.

dation. No doubt it would be convenient for the various boards of county commissioners to have at all times discretionary control of indebtedness equal to one and one-half per cent. of taxable property; but a power so clearly withheld by the legislature cannot be conferred by the courts.

Lastly, it is urged on behalf of the appellant that the contract between the Imperial Loan & Trust Company and the county is illegal. The statute prescribes that county bonds may not be sold by the county commissioners at less than their par value. While the contemplated sale in this case is nominally a sale at par, it is in fact a sale at a discount and, therefore, within the inhibition of the statute. To sell the bonds at their face value and at the same time pay a large commission to the purchaser is not to sell at par. It is argued, however, by the learned counsel for the respondents that, inasmuch as the county might have issued seven instead of five per cent. bonds, and inasmuch as the bonds as sold do not cost the county a greater rate of interest than seven per cent. on the amount realized, the sale is really not below par. But the argument may be sufficiently answered by saying that the validity of the contract must depend upon its terms and not upon its ultimate effect upon the county.

The judgment is reversed, and the cause remanded with directions to overrule the demurrer.

DUNBAR, C. J., and SCOTT, J., concur.

HOYT, J. (*concurring*).—I think that the discount did not invalidate the contract of sale, but concur as to the other questions decided.

STILES, J. (*dissenting*).—Concerning the figures showing the amount of the county's invalid indebtedness, I think some correction should be made of the majority

opinion. It is true that the complaint set out that between September 12, 1892, and May 3, 1893, the commissioners incurred a debt of \$42,298.60 on account of the court house, and of \$68,028.32 by the issuance of warrants, all of which was invalid; but it also shows that of these amounts \$14,650 of the court house debt and \$43,524.44 of the warrant debt was incurred *before* October 15, 1892. Now the valid debt limit up to the latter date was \$919,672.02, and the actual debt, including the last two items incurred before that date, was but \$761,533.75; so that those items were lawfully incurred, since the court holds that the change in the limit did not occur until October 15, and the actual invalid indebtedness on May 3, 1893, was therefore \$52,134.48, instead of \$110,308.92.

On the point made as to the commission contracted for, I think it proper to say that this case differs from that of *Yeeler v. Seattle*, 1 Wash. 308 (25 Pac. 1014). In that case the statute invested the council with the authority to sell the bonds as it should deem best for the interest of the city; but here the bonds must be exchanged for an equal amount of county warrants or sold at par. Laws 1889-90, p. 39, § 5. This point alone would sustain the complaint for an injunction against the sale of the bonds under the contract, but it would not affect the validity of the issue if sold at par under some other arrangement.

However, the principal result of the decision is to hold the whole issue void, and to that proposition I cannot yield assent. I agree with the view which the court takes that there is no such thing as voting an indebtedness which shall remain suspended above the one and a half per cent. limit, although all or a part of the indebtedness within that limit shall be paid off, and that is about all that the court seems to have decided. But that was not the vital question. It is true that counsel for the county sought to have

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this court declare that such an operation could be brought about. But it seems to me that that would be merely a question for future consideration when, after the debt outside of the bonds had been paid off so that with the bonds it would exceed the limit and without them it would not, the board should propose to incur further debt without a vote. Now, and here, the question is purely and singly whether these bonds have a legal basis for their issuance, without regard to what may be done with the proceeds, or what may be necessary in the future when it is desired to incur further indebtedness. In my judgment the trouble with them, if any, is found in the manner in which the vote was taken. The board first spread upon its records a recitation of the fact that it was necessary to provide for the running expenses of the county by reducing the outstanding indebtedness below the limit, and declared its intention to submit the question of issuing bonds in the sum of \$300,000 above the limit for the purpose of procuring money to fund that amount of outstanding warrants.

This was a mere funding proposition if carried out, and required no vote, as held in *Murry v. Fay*, 2 Wash. 352 (26 Pac. 533), unless the plan of keeping the bond debt up in the voting limit of three and a half per cent. could be sustained, upon which the court is of the contrary view. Under *Murry v. Fay* the whole of the valid debt of \$761,533.75 could be funded by the commissioners, without an election, either by an exchange for warrants, or by sale of bonds and payment of warrants. But that operation would not have accomplished the purpose desired, viz., of procuring means for meeting current expenses. It could be accomplished only in one of two ways: either by authorizing an enlargement of the debt limit under § 2 of the act (Laws 1889-90, p. 37), or by borrowing money under § 3. If the former method were chosen the commissioners could

again fund the debt so created without further vote; but under the latter they must issue bonds. Now in full view of the law and of the circumstances making it necessary to either extend the debt limit or borrow money, the latter plan was adopted, and the intention was announced to be that of borrowing; and the only trouble with the plan executed was that the proposal to borrow was coupled with a declaration that the purpose of the borrowing was to fund warrants. This made it indefinite, and if literally followed would have left the county in no better condition than before, for the money would all be paid out and the limit would still stand where it was before, completely filled up.

But I cannot conceive that any voter could have been misled into supposing that the debt limit was not to be increased by \$300,000; for on the ballot which he voted it was expressly stated that this amount of bonds was to be issued above the limit allowed without a vote. Thus, I think the authorization of the issue ought to be permitted to stand. It is somewhat irregular and unsatisfactory, I frankly admit, but the ultimate purpose to borrow money and increase the debt limit is so clearly apparent that no one can have been deceived, and if so the loose declarations of the commissioners ought not to defeat so important a matter.

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[No. 1159. Decided March 12, 1894.]

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12	184

JOSEPH HALL, *Respondent*, v. A. G. MATTHEWS AND
TACOMA GROCERY COMPANY, *Appellants*.

SALE—WHAT CONSTITUTES—CONSIDERATION—ANTECEDENT DEBT
—PRIORITY OF MORTGAGEE.

A finding of the trial court in an action at law that a sale of certain property was an absolute one will not be set aside when it appears from the evidence that the sale was made in consideration of a valid indebtedness from the seller to the purchaser, which was equal to the value of the property, and that the purchaser immediately took possession under the bill of sale and commenced disposing of the property as his own, although it appears that the purchaser was ignorant of the value of the property; that, at or near the same time the bill of sale was given, certain accounts were assigned by the seller to the purchaser; and that the testimony in regard to the cancellation by the purchaser of a promissory note as part of the consideration was not clear and satisfactory.

The holder of an unrecorded chattel mortgage given for a consideration passing between the parties at the time of its execution has no priority over one holding under a bill of sale of the same property, though the sale is in consideration of an antecedent debt, when the failure of the mortgagee to record his mortgage was due to an agreement between the parties made for the mortgagor's benefit.

Appeal from Superior Court, Pierce County.

Stevens, Seymour & Sharpstein, for appellants.

O'Brien & Robertson, for respondent.

The opinion of the court was delivered by

SCOTT, J.—Prior to and on the 21st day of June, 1893, one Richards was the owner and in possession of a stock of merchandise, and engaged in a retail mercantile business in the town of Wilkeson, and on said date was indebted to the appellant, the Tacoma Grocery Company, in the sum of \$700, for groceries previously sold by said appellant to him. On said day, Richards, desiring to procure more

merchandise of appellant, executed to it a chattel mortgage on his stock of merchandise to secure the amount he owed for goods previously purchased, and also to secure the purchase price of the goods sold to him at the time the mortgage was given. By an agreement between the parties this mortgage was not placed on record, and Richards continued in possession of the property, and conducted the business as theretofore until the 24th day of July following, at which time he executed a bill of sale of said stock of groceries to the respondent Hall, who, as shown by the testimony, had no notice of appellant's mortgage.

On the day following the execution of the bill of sale, Hall sent an agent to Wilkeson, and took possession of the property and proceeded to dispose of it. Soon thereafter appellant placed its chattel mortgage on record, and instituted foreclosure proceedings by notice, under § 1650, *et seq.*, Gen. Stat., by virtue whereof it seems to have obtained possession of the property in some manner, and Hall brought this action in replevin to recover possession. A jury was waived, and the court found in favor of the plaintiff, and found that the bill of sale so executed by Richards to Hall was an absolute sale of the property in controversy.

The question first to be determined is whether the finding that it was an absolute sale can be set aside. Unless this question of fact is found in favor of appellant, the further question presented that the plaintiff could not maintain replevin is immaterial. This was an action at law, and therefore the question presented to us is, whether there was testimony before the lower court upon which its finding in this particular can be sustained, and we think it must be answered in the affirmative. There is no question raised but that the purported consideration for the bill of sale, that is, the indebtedness of Richards to Hall, was a good one and equalled the full value of the property.

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Furthermore, Hall immediately proceeded to take possession of the property under said bill of sale, and commenced disposing of it as his own, and he testified upon the trial that it was an absolute sale.

Against this some strong circumstances, however, are presented. It does not appear that Hall knew anything about the value of this property at the time he claims to have purchased it, and satisfied an indebtedness of something over a thousand dollars which he held against Richards. He testifies that he had not seen said stock of merchandise for some months previously; and it does not appear that Richards or any one else represented to him at said time what the value of said stock was. Part of said consideration was a note for \$500, given for money loaned by Hall to Richards. The respondent, in his brief, says as follows with regard to a portion of Hall's testimony:

“He positively swears that the instrument under which he claims was given and received as a bill of sale; that the consideration was fully paid by surrendering up Richards' note for \$500, and settling up an account of \$546.47 owed to him for liquors sold to Richards.”

But the brief does not refer to any page of the statement of facts showing such testimony with regard to the surrender of the note. After a careful examination of the testimony we fail to find anything even tending to show that said \$500 note was surrendered to Richards at that time, or at all. Hall makes no such statement. Had such testimony been given at the trial it is difficult to understand why it was not put in the record, as it certainly had a most important bearing upon this question.

It further appears that while Hall was upon the stand and being cross examined, at the request of appellant's attorney, he produced the note. It was then evidently in his possession. But appellant in its reply brief does not

deny the statement made in the respondent's brief that Hall testified that he had surrendered the note to Richards. There were no entries in the books produced showing a settlement of the book account. These facts, however, do not conclusively prove that the note and account had not been settled. The note was not incorporated in the record in taking the appeal. It may have shown a cancellation upon its face.

There are other circumstances tending to show that said sale was not an absolute one, one of which is that certain accounts were assigned by Richards to Hall at or near the same time that the bill of sale was given. The testimony offered with regard to this is very meager. It is not claimed that they were sold outright to Hall for a valuable consideration, and there is nothing in the record explaining the transaction. Were this question of fact in controversy submitted to us to determine upon the preponderance of the evidence, as in an equity case, we should be compelled to find in favor of appellant, but the findings of the lower court on questions of fact in an action at law stand very much the same as the verdict of a jury, and we are not at liberty to set them aside because a preponderance of the evidence is against them.

Nor do we think appellant is in a position to raise the further point contended for that its mortgage claim is entitled to precedence of the transfer to the respondent, on the ground that its mortgage was given in part for a consideration which passed between the parties at the time of its execution, while the bill of sale to respondent was given on account of an antecedent debt. It is contended that a conveyance on account of preëxisting indebtedness is not in good faith as against the holder of such a prior unrecorded mortgage, and some authorities are cited by appellant sustaining this position. The question is an important one, but as it is not necessary to the decision of

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this case, for the reason hereinafter stated, we express no opinion thereon.

It appears that Richards, while engaged in business, was buying goods of both parties, and as far as the \$700 prior indebtedness of Richards to appellant is concerned, it is entitled to no precedence over his indebtedness to respondent. It appears, however, that the remaining sum of \$300 of the mortgage consideration of \$1,000 was given for goods which were sold to Richards at the time of the execution of the mortgage. With the exception of one small item, it does not appear that the indebtedness of Richards to the respondent was contracted after the execution of the mortgage, and if the note was not surrendered or canceled it would not appear that there had been any substantial change of the nature of the indebtedness, or the evidences thereof, of Richards to respondent.

Nor are we prepared to say, from the testimony, that the respondent was placed in any worse position on account of the execution of the bill of sale to him, and his actions thereunder, although he took and maintained possession of the stock of goods for two days, and made sales therefrom in conducting the store during said time.

But the failure to have the mortgage recorded was due to an agreement between the parties, and it appears that this agreement was made for Richards' benefit. Appellant concealed its rights in the premises to enable Richards to carry on his business and for the purpose of not impairing his credit, and Richards continued to buy and sell goods after the mortgage was given until the respondent took possession of the stock under his bill of sale. While we are satisfied that there was no actual intentional bad faith on the part of appellant in entering into this agreement, it practically amounted to bad faith as against the other creditors of Richards, for the effect of it was to lull them into an unwarranted feeling of security, and it is sufficient

to defeat appellant's contention in the premises, whatever rule should obtain with regard to the priority of such claims where the failure to record is due to some other cause. Had this mortgage been put upon record, respondent might have proceeded earlier and in some other manner to collect or secure his claim. Richards may have had other property at this time, from which the same could have been satisfied; in fact, it appears that at or near such time he did have outstanding accounts of some several hundred dollars in value.

Affirmed.

DUNBAR, C. J., and HOYT, ANDERS and STILES, JJ.,
concur.

8	412
12	559
8	412
19	332
8	412
20	631
20	709
8	412
31	215

[No. 1242. Decided March 12, 1894.]

THE STATE OF WASHINGTON, *on the relation of John McReavy, Appellant*, v. THOMAS BURKE, *Respondent*.

OFFICE AND OFFICERS—STATE CAPITOL COMMISSIONER—POWER OF GOVERNOR TO REMOVE FROM OFFICE.

The act of March 21, 1893, in relation to state capitol commissioners, provides that "The commissioners so appointed shall hold office till the completion of said building and the acceptance thereof by the state unless sooner removed for cause by the governor," and, as such act contains no provision concerning the method of removal, it must be construed in connection with a prior act of the same session (Laws 1893, p. 247), providing for the removal from office by the governor of all state officers appointed by him who are not liable to impeachment; and, construing these acts together, the legislative intent is plain that the tenure of office of an appointive member of the capitol commission should be indefinite, and such officer liable to removal without a hearing for misconduct, malfeasance or incompetency, when the governor should be satisfied that any such causes exist.

Appeal from Superior Court, Thurston County.

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Argument of Counsel.

Turner, Graves & McKinstry, and Wickersham & Reid,
for appellant:

Where power to remove an officer for cause is reposed in any tribunal or officer, that power cannot be exercised without notice and a hearing; that is to say, the officer proceeded against must be given notice of the charges made against him and be given an opportunity to be heard in his defense against such charges. *Mechem, Public Officers*, §§ 454, 455; *High, Extr. Leg. Rem.*, § 68 *et seq.*; *Merrill, Mandamus*, § 147; 1 *Dillon, Mun. Corp.*, §§ 250, 256; *Throop, Public Officers*, § 364 *et seq.*; *Baggs' Case*, 11 *Coke*, 99; *King v. Gaskin*, 8 T. R. 209; *Ramshay's Case*, 18 Ad. & El. (N. S.) 190; *Williams v. Bagot*, 3 B. & C. 772; *Queen v. Archbishop*, 1 Ell. & El. 545; *Rex v. Richardson*, 1 Burr. 517; *Commonwealth v. Slifer*, 25 Pa. St. 23; *Field v. Commonwealth*, 32 Pa. St. 478; *Commonwealth v. Shaver*, 3 Watts & S. 338; *Page v. Hardin*, 8 B. Mon. 672; *Lowe v. Commonwealth*, 3 Metc. (Ky.) 237; *Dubuc v. Voss*, 19 La. An. 210; *Dullam v. Willson*, 53 Mich. 392; *State v. St. Louis*, 90 Mo. 19; *State v. Bryce*, 7 Ohio, 82; *Willard's Appeal*, 4 R. I. 601; *Mead v. Treasurer*, 36 Mich. 416; *Crawford v. Township Board*, 24 Mich. 248; *McGregor v. Gladwin Co.*, 37 Mich. 388; *Leeman v. Hinton*, 1 Duval, 37; *State v. Lingo*, 26 Mo. 496; *Pronell v. Foulks*, 5 Baxt. 649; *Hawkins v. Kercheval*, 10 Lea, 535; *Murdock v. Trustees of Phillips' Academy*, 7 Pick. 303, 12 Pick. 244; *State, ex rel. Gill, v. Common Council of Watertown*, 9 Wis. 229; *Haight v. Love*, 39 N. J. Law, 14; *People v. Mayor*, 19 Hun, 441; *People v. Commissioners*, 106 N. Y. 64; *State v. Chamber of Commerce*, 20 Wis. 68; *State v. Chatburn*, 63 Iowa, 659; *Stockwell v. Township Board*, 22 Mich. 341; *Evans v. Populus*, 22 La. An. 121; *State v. Graham*, 25 La. An. 73; *Hallgren v. Campbell*, 82 Mich. 255; *Board v. Darrow*, 13 Col. 460; *Madison v.*

Korbly, 32 Ind. 74; *Foster v. Kansas*, 112 U. S. 201; *Kenard v. Louisiana*, 92 U. S. 480; *People v. Commissioners*, 103 N. Y. 370; *People v. Burnside*, 3 Lans. 74; *People v. Albany*, 62 How. Pr. 220; *Geter v. Commissioners*, 1 Bay, 354; *Singleton v. Commissioners*, 2 Bay, 105. The power of removal for cause, conferred by statute, must be strictly pursued, and if not so pursued the attempted removal is a nullity. *McGregor v. Supervisors*, 37 Mich. 388; *People v. Mayor*, 19 Hun, 441; *People v. Fire Commissioners*, 72 N. Y. 445; *Selby v. City of Portland*, 14 Or. 243; *Street v. County Commissioners*, Breese, 50; *Mechem, Public Officers*, § 452.

Andrew F. Burleigh, and *James A. Haight*, for respondent:

Where the constitution, or the legislature in the exercise of its unlimited power, gives the governor power to remove any officer whom he may appoint in case of incompetency, neglect of duty or malfeasance in office, and is silent as to the mode of its exercise, it follows that the governor may determine whether any of the causes exist for removal, from the best light he can get, and adopt such mode of procedure as he may deem proper and right, and it is not for the courts to dictate to him in what manner he shall perform the duty. No written charge, notice or formal trial is necessary. *Wilcox v. People*, 90 Ill. 186; *People v. Higgins*, 15 Ill. 110; *Kennedy v. McGarry*, 21 Wis. 502; *Attorney General v. Brown*, 1 Wis. 442; *People v. Stout*, 19 How. Pr. 171; *State v. Doherty*, 25 La. An. 119; *Keenan v. Perry*, 24 Tex. 253; *Donohue v. County of Will*, 100 Ill. 94. The grant of power in the governor to remove an officer when he is satisfied that a certain cause exists, implies authority to judge of the existence of the cause and empowers him to remove the officer without notice or hearing. *Throop, Public Officers*, § 346; *People*

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v. Whitlock, 92 N. Y. 191; *O'Dowd v. Boston*, 149 Mass. 443; *Sweeney v. Stevens*, 46 N. J. Law, 344; *Patton v. Vaughan*, 39 Ark. 211; *Wilcox v. People*, 90 Ill. 186.

It is a well settled rule of law of the courts of this country that, where a definite term of office is not fixed by law, the officer or officers by whom a person was appointed to a particular office may remove him at pleasure, and without notice, charges or reasons assigned. *Throop, Public Officers*, § 354; *Ex parte Hennen*, 13 Pet. 230; *People v. Fire Commissioners*, 73 N. Y. 437; *People v. Hayden*, 10 N. Y. Supp. 794; *Carr v. State*, 111 Ind. 101.

The opinion of the court was delivered by

SCOTT, J.—By an act of the legislative assembly, approved March 21st, 1893 (Laws p. 462), a board to be known as “The State Capitol Commission” was created for the purpose of erecting a state capitol building; said board to consist of five members, of whom three were to be appointed by the governor by and with the advice and consent of the senate.

The appellant was one of the members originally appointed by the governor to a position on said commission under the provisions of this act. He held this office until the 6th day of February, 1894, when the governor filed in the office of the secretary of state an order removing appellant from said office, and appointing respondent to fill the vacancy caused by the removal, a copy of which order was duly served on appellant. The respondent duly qualified and entered upon the duties of the office, and thereupon appellant brought this information in the nature of *quo warranto* in the superior court of Thurston county, for the purpose of trying the question of the title to said office, as between himself and the respondent; alleging in his information, after setting forth the facts hereinbefore stated, that the removal was made by the governor

without authority and without notice to him of the pendency of investigation of any charge or charges against him of misconduct in office, and without having given him any opportunity whatever to defend himself against any such charge or charges. To this information respondent demurred on the ground that the same does not state facts sufficient to constitute a cause of action, and upon the further ground that it appears affirmatively from said information, that the relator was duly and legally removed from said office and the defendant duly and regularly appointed to fill the vacancy, and had duly qualified and entered upon the duties of said office. The court below sustained the demurrer, and appellant electing to stand upon his information, judgment was rendered in favor of the respondent, from which judgment the relator took his appeal to this court.

The act creating said board contained the following clause relating to the term of office:

“The commissioners so appointed shall hold office till the completion of said building and the acceptance thereof by the state unless sooner removed for cause by the governor.”

No way was specified in said act as to the manner of such removal. The only other legislation upon the subject is found in an act approved March 10, 1893, which is as follows:

“SECTION 1. The governor of the State of Washington is hereby authorized and empowered to remove from office all state officers appointed by him not liable to impeachment for incompetency, misconduct or malfeasance in office.

“SEC. 2. Whenever the governor is satisfied that any officer not liable to impeachment has been guilty of misconduct or malfeasance in office, or is incompetent, he shall file with the secretary of state a statement showing his reasons with his order of removal, and the secretary of state

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shall forthwith send a certified copy of such order of removal and statement of causes by registered mail to the last known postoffice address of the officer removed.

“SEC. 3. At the time of making the removal from office herein provided for, the governor shall appoint some proper person to fill such office, who shall forthwith demand and receive from the officer removed the papers, records and property of the state pertaining to the office and shall perform the duties of such office and receive the compensation thereof until his successor is appointed.”

This act seems to have been passed in pursuance of § 3, art. 5 of the constitution, which provides that—

“All officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law.”

The office in question is a state office, and such officers do not fall within the class of state officers liable to impeachment.

The order removing appellant as a member of said commission specified that it was for misconduct in office. It is contended by appellant that he could not be removed until after a hearing upon charges whereof he should have notice and an opportunity to appear and defend. It is conceded that no such notice was given or hearing had. A long line of authorities have been presented and an able argument made upon the proposition that where an officer has been appointed for a definite term and is only subject to removal for cause, he cannot be removed except in pursuance of a finding against him upon charges constituting a cause, of which he has had notice and an opportunity to contest; and while there are some cases to the contrary, we are well satisfied that the great weight of authority is with the appellant, and the question to be determined is whether this case falls within that class. This depends upon the question as to whether such term is a fixed and definite one within the contemplation of such rule. The

office is not one provided for by the constitution, but was created by legislative enactment. If the term depended solely upon the provision in the act that, "the commissioners so appointed shall hold office till the completion of said building and the acceptance thereof by the state," we would regard it as a fixed and definite one, as much so as if the act prescribed that the term should continue for two years. But it does not depend upon this provision exclusively. In enacting the law the legislature recognized the fact that public interests might require the term of service of any particular appointee to be terminated before the completion and acceptance of the building, and consequently provided that the persons appointed should only so hold, "unless sooner removed for cause by the governor."

It will be noticed that no cause is specified in the act, nor any manner of removal other than it shall be by the governor. Owing to this failure to point out any method of removal, it seems clear that the legislature must have had in view the prior act relating to removals by the governor, and if such is the case the two acts should be construed together in this connection. The fact that the last act contains the clause that it does with regard to removals lends force to the view that it was intended as a limitation of the term, and that the term was intended to be an indefinite one, depending, in part as to its limitation, upon the happening of the contingency contained in the clause. Otherwise, it would have been unnecessary to have inserted this clause, for the prior act conferred the power to remove, generally, upon the governor.

The case presented varies in this respect from many of those cited, and strengthens the respondent's position. If the clause relating to removals by the governor in the act creating the board depended entirely upon the constitutional provision respecting removals, independent and ex-

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clusive of the prior legislative enactment, it would probably be inoperative on account of indefiniteness in failing to prescribe any manner of proceeding, and it might be open to the further objection that the question to be determined is a judicial one and the governor, as such, has no judicial power. Such power is expressly vested by our constitution in the courts. It is true the legislature may create other courts than those specified by the constitution—"inferior courts," according to the language used, but inferior perhaps only in the sense that the jurisdiction would be special and limited and not general. There is no question but that the legislature could have constituted the governor, or any person or body it saw fit to, a court to determine such questions, and have made such determination final. But there was no attempt whatever to do this. It is a well settled rule that legislative enactments should be so construed as to be given force and rendered operative, if practicable, under recognized rules of construction. Therefore, it seems necessary, in order to give the latter act force in this particular, that it should be construed in conjunction with the prior act relating to removals from office.

It is not contended by appellant that this act is unconstitutional except only incidentally in alluding to the fact that it lays down an additional ground for removals from office to those contained in the constitution, viz., the incompetency of the incumbent, which is not involved in this case. As appellant has not attacked the act upon constitutional grounds in connection with this case, we do not question it, for it is well settled that the courts will approach such questions with the greatest caution, and that acts of the legislature will not be held void or unconstitutional unless the question is directly involved and the conflict clearly apparent.

Furthermore, if the act should be held unconstitutional as applying to an office created by the constitution, or as

to one created by the legislature with a definite prescribed term, it seems to us it may yet have force in connection with the removal clause in the law creating this commission. Neither does appellant maintain that these acts should not be construed together, but contends that in any event he was entitled to a notice and a hearing, as the removal could only be for cause.

It is contended that a removal for cause involves a direct attack upon the reputation of the officer, and, although the rule that a person has a vested right in an office no longer obtains in this country, that such officer nevertheless has a right to be heard upon any charges brought against him where a removal can only be had for cause. The authorities presented are based upon the propositions that a summary removal without a hearing violates the rights of the individual, and is repugnant to our principles of government. There is much that may be said in this connection. Although the individual has no vested right in an office to which he has been appointed or elected, the public has an interest in retaining an efficient public servant, and it may be said in this case that the object of the legislature in creating the state capitol commission was to obtain the combined judgment of the members of the commission upon the matters entrusted to them, and if the governor can summarily remove a member of said commission it in effect destroys the purpose of the act in this direction, for in case a majority of said board should not agree with the governor upon any proposition it would only be necessary for him to remove the opposing members and appoint other persons in their places, and thus the action of the board would be in effect but the action of the governor.

Upon the other hand it must be conceded that where an officer is disqualified for any reason to perform the duties entrusted to him, the rights of the public can best be subserved by providing for a summary removal, to the end

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that a delay in the prosecution of public matters will not be necessitated and public interests jeopardized until such matters can be judicially determined by possibly a protracted litigation.

The foregoing questions are ones of public policy, to be addressed to and determined by the legislature, but within, of course, constitutional limits. It is not contended that the governor would not have had power to remove appellant for cause after giving him notice and an opportunity to be heard in his defense; nor is it contended that such a hearing would not be a final one. If then, according to a supposititious case put by appellant, the governor should be disposed to act unfairly and arbitrarily in the first instance, he could as well act regardless of the merits of the showing made upon such hearing, and it is difficult to see how the rights of the incumbent would be any better protected or subserved by such a hearing. Under such circumstances the right to be heard would afford but cold comfort indeed.

It seems to be well settled that the legislature in creating an office may limit the duration of the term in any way it deems fit, if there is no constitutional provision which would fix the term. It might make it determinable at the pleasure of the governor or any other person. In this case the power was entrusted to the governor—to act, it is true, upon certain grounds—yet his action or non-action would be purely discretionary. The courts could no more compel him to act than they could review his action when taken. The legislature saw fit to confide this matter to him, and as to the argument that it might result in a failure to get the benefit of the judgment of a board of men, it will be observed that the nominating of these men was reposed in the governor in the first instance. The fact that they were to be confirmed by the senate would not alter the matter in this respect materially, for a failure to confirm is excep-

tional, and in this case the appointments were made after the legislature had adjourned, and there has been no confirmation.

It may fairly be said that by inserting the removal clause in the last act in view of the former act, the intention was not to fix a definite term, and that the clause was made a part of the provision fixing the term, to the end in effect that the persons appointed should only hold office so long as they should perform their duties to the satisfaction of the governor. The duration of their official life was confided to his discretion in this particular. Whether or not this was a wise or a just provision was for the legislature to determine. The legislature did determine it, and appellant accepted the office with this condition attached to it. Having in view the former act, the provision in effect was that the governor should only act in case of the incompetency, misconduct or malfeasance of the incumbent, but the determination of the existence of any of these causes rested with the governor.

Now the manner of proceeding and the right to contest must be determined by the act. What was the legislative intention? The act does not in terms provide for a hearing or give a right to a contest, but it would not follow from this necessarily that there need not be any hearing, and that the appellant did not have a right to controvert the existence of the cause, and we should hold that he did have if there was nothing other than this to determine what the intention was, if the act could be operative at all where no manner of proceeding is pointed out. But in addition to the fact that there is no specification as to this, the act is specific as to the manner of proceeding otherwise. It provides that the governor shall file with the secretary of state a statement showing his reason, with his order of removal, and that the secretary of state shall forthwith send a certified copy of such order of removal and state-

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ment of causes by registered mail to the last known post-office address of the officer removed. This is inconsistent with the claim that there must be a prior hearing, for so much particularity would then be unnecessary. The fact that the reason or cause of the removal must be stated in the order would lend some force to the view that such action was not intended to be final. This is not claimed, however, and the act elsewhere settles the matter otherwise. Possibly it would not be final if a cause other than those enumerated should be specified in the order. But this question is not involved in the present case. The act further provides that at the time of making the removal the governor shall appoint another person to fill such office, who shall forthwith perform the duties of the office. This is inconsistent with any view that such action was not intended to be final; for if the governor could not conclusively end the incumbent's term of office, he should not be allowed to deprive him of a part of his term, and this both from the individual and a public standpoint. Again, and most important of all, the act provides for such action *whenever the governor is satisfied that any of the enumerated causes exist*. It does not say how the governor is to be satisfied, and the manner in which he becomes satisfied cannot be inquired into.

No one can well read this act and be in doubt as to the legislative intention. It is clear and certain, and it must be upheld unless void upon constitutional grounds. There is no question but that the specific terms of the act were complied with, and if the act is valid the governor presumptively performed but a plain duty enjoined upon him by the legislature. While the act is not directly attacked as unconstitutional, it is inferentially, perhaps, on the ground that the constitution, as bearing upon the act creating the board, requires a notice to the incumbent, and an opportunity to be heard before final action. But, never-

theless, it may be construed in connection with the clause aforesaid contained in the later act, in arriving at the intention as to fixing the duration of the term.

A case nearly like this, coming from a state where the rule contended for by appellant is recognized where the term is a fixed and definite one, is that of *People v. Whitlock*, 92 N. Y. 191. The mayor of Syracuse had authority to remove the officer in question "for any cause deemed sufficient to himself." This is no stronger than the language used before us, *whenever the governor is satisfied* of the existence of any one of the causes enumerated. The act involved in the case cited, which was in force when the officer was elected, provided that he might "be removed for cause in the same manner as sheriffs are removed." The act under which the removal was made was passed while he was in office. The court held that, "the office was created by the legislature, and they might abridge its terms by express words or specify an event upon the happening of which it should end," and that the event specified was removal by the mayor; also, that such action might be had without any notice or hearing.

Another very similar case is that of *State v. McGarry*, 21 Wis. 502. The statute defining the powers of the board of supervisors of Milwaukee county contained this language:

"Said board shall also appoint one inspector for said house of correction . . . who shall hold his office for the term of two years, commencing on the first Monday of January succeeding his appointment unless sooner removed by said board for incompetency, improper conduct or other cause satisfactory to said board. The cause of such removal shall be particularly assigned in writing and entered upon the minutes of said board, with the ayes and noes upon the adoption of the vote for such removal."

The court held that the action of the board in removing the incumbent in the manner specified for one of the causes

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assigned was final and not subject to review; that the power of the board was absolute when acting within the scope of its power, and that the only question which could be reviewed was as to whether the board kept within its jurisdiction and had acted upon a cause assigned for removal under the statute. Persons were examined before the board, but without being sworn as witnesses, and the defendant was not permitted to cross examine them. The court held that this was immaterial, and that the board might have proceeded *ex parte* without notice to the incumbent and without any examination of witnesses formally or otherwise.

State v. Hawkins, 44 Ohio St. 98 (5 N. E. 228), was a case where the governor removed a police commissioner for official misconduct. It was contended that the power of removal was judicial and could not be exercised by the governor, and that the court might look to the evidence to say whether the governor acted on sufficient grounds. The court determined both questions in the negative, and held the exercise of such power by the governor to be administrative in character. In this case notice had been given and a hearing was had, but the law which authorized the removal for official misconduct did not contain the clause "whenever the governor is satisfied."

O'Dowd v. City of Boston, 149 Mass. 443 (21 N. E. 949), was a case where a subordinate had been removed by a board of directors under a law which provided that such board "may remove such subordinates for such cause as they may deem sufficient and shall assign in their order for removal." The removal was a summary one without any notice or hearing. It was contended that the statute required a removal for cause, and that the import of the statute was that there should be charges stating the cause of removal, and a hearing and adjudication upon them; and that the words "for cause" have acquired a technical

meaning, in which it will be presumed the legislature used them. The court held that these words were qualified by the other words authorizing the board to remove for such cause as they determined to be sufficient, and sustained the removal, holding that a notice and hearing was not required. The court said the intention of the statute seemed to qualify a removal at pleasure by requiring a record to be made of the cause, and that with or without a hearing there was a record of the cause of removal, and the only appeal in either case was to public opinion.

State, ex rel. Sweeney, v. Stevens, 46 N. J. Law, 344, was a case where a jailer was removed by the board of chosen freeholders without any hearing. The appointment and removal were made under a statute which provided that "the board of freeholders shall appoint some proper person to be the jailer or keeper of the jail of said county, who shall hold his office for the term of five years, and until another be appointed in his stead; but such jailer may at any time be removed from office, by a vote of two-thirds of all the chosen freeholders of the said county, for the time being." The court said that "the legislature, in creating the office, had the right to provide for its vacation in such manner as they saw fit, and in ascertaining what the manner is, we must take their language in its ordinary import;" that the statute in effect confided the tenure of office to the discretion of two-thirds of the members of the board, and that the board might act regardless of the fact as to whether there was any just cause for removal. Also, see *Throop on Public Officers*, §§ 345-396.

Some of the cases cited go further and hold where the term is a fixed and definite one, and where removal can only be had for cause existing, that the authority to remove may be vested in a person as a discretionary one, and may be exercised without a notice or hearing, and not sub-

ject to review. But, as stated, the weight of authority is against this. Nor do counsel for respondent undertake to maintain otherwise in this case. But contend that the two acts in question here must be construed as a limitation upon the term of the person appointed, and consequently that the term is in so far an indefinite one, and their contention in this respect must be sustained.

Affirmed.

DUNBAR, C. J., and HOYT and ANDERS, JJ., concur.

STILES, J.—Solely on the ground that this was not a constitutional office, I concur in the result.

[No. 1009. Decided March 13, 1894.]

HENRY C. WOOD AND DIXON C. HUGHES, *Respondents*, v.
CASCADE FIRE AND MARINE INSURANCE COMPANY, *Appellant*.

FIRE INSURANCE—WHEN CONTRACT VOID—ACTION ON POLICY—
PLEADING—INTEREST.

In an action upon a policy issued by an insurance company incorporated in this state upon property in the State of New York, an answer alleging that the company was not authorized to do business in the State of New York; that by the laws of said state policies issued without compliance therewith are declared to be null and void unless procured by a licensed agent therefor; that the policy in suit was procured by a broker of New York city, and that such pretended policy of insurance sued on was issued, delivered and received in violation of the said laws of the State of New York, and was not procured in the manner in said laws provided or authorized, states facts sufficient to constitute a defense.

Interest is recoverable on the amount due under an insurance policy from the time such sum becomes payable.

Appeal from Superior Court, King County.

Hughes, Hastings & Stedman, for appellant.

Fishback, Elder & Hardin, for respondents.

The opinion of the court was delivered by

ANDERS, J.—This action was brought by the respondents upon a fire insurance policy issued to them by the appellant, to recover the sum of \$1,500, the amount for which certain property was alleged to have been insured, and which was destroyed by fire.

The appellant is a corporation, organized under and by virtue of the laws of the Territory (now State) of Washington, having its principal place of business at Seattle. The respondents, at the time of the alleged insurance and loss by fire, were residents of the city and State of New York, and the property insured was personal property then in the said city and state.

The sufficiency of the complaint does not appear to be questioned. But the defendant, appellant here, as an affirmative defense to the action, pleaded that the defendant was a corporation organized under the laws of the Territory of Washington, and that the policy of insurance sued upon, a copy of which is set forth in the plaintiffs' complaint, was procured from one Lithgow by one William Warbeck, an insurance broker of the city and State of New York, and was on or about the 1st day of November, 1890, issued to the plaintiffs, who were at that time and at all times since, residents of the state of New York, and described property then and at all times thereafter situated in the city of New York. That the legislature of the State of New York had enacted certain general laws regulating the business of insurance in said state, and providing when and upon what conditions insurance companies organized under the laws of other states might issue policies of insurance upon property in said state, and might be entitled

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to transact insurance business therein, and provided that it should be unlawful for any such insurance company to transact any business of insurance whatever until said laws had first been complied with. That the legislature of the State of New York had enacted a law for the further regulation of the business of insurance in said state, amendatory of the laws theretofore in force, which law, among other things, declared that any policies of insurance issued by companies not having complied with the requirements of the general insurance laws of said state should be void and of no force or effect whatever, which law was approved May 23, 1884, and amended by chapter 113 of the laws of 1885 of said state, approved April 7, 1885, and further amended by chapter 552 of the laws of 1890, approved June 7, 1890. That the aforesaid laws were in force in said State of New York at and prior to the 1st day of November, 1890, and still continue to be in force in said state, and that the defendant had never at any time, nor in any manner, complied with the provisions of the aforesaid laws of said State of New York, and had never at any time been licensed or empowered to take any risks or to issue any policies of insurance on property situated in the said State of New York, or to residents thereof, or to transact any business whatever authorized by its charter within the said State of New York, and has never had the capital required by the provisions of the aforesaid laws, and that the pretended policy of insurance sued on was issued, delivered and received in violation of the said laws of the State of New York, and was not procured in the manner in said laws provided or authorized. Copies of the laws referred to were attached to and made a part of said answer.

The plaintiffs interposed a demurrer to this affirmative matter, upon the ground that the facts therein stated did not constitute a defense to plaintiffs' cause of action. This demurrer was sustained by the trial court, and the ruling

of the court thereon is the principal ground of error relied on for reversal of the judgment appealed from.

For the purposes of the demurrer all of the facts well pleaded in the answer must be admitted. The question, therefore, to be determined is, whether the facts pleaded therein, and thus admitted, show that the contract of insurance, as evidenced by the policy sued on, was made in New York. If it was made there it is there illegal and void, because it is in contravention of the statutes of that state. And if it is invalid there it is invalid everywhere (*Hyde v. Goodnow*, 3 N. Y. 267; *Lamb v. Bowser*, 7 Biss. 315), and cannot be enforced here.

The policy itself, as set forth in the complaint, purports to have been executed by the president and secretary of the company, and by J. W. Lithgow, general agent, and countersigned at Chicago, Illinois, on October 28, 1890. The presumption is, there being nothing to show to the contrary, that the policy is valid if made either in Chicago or Seattle, the home of the company. And this presumption can only be overcome in this instance by averments of facts showing that it was made, or first became operative, in the State of New York. It must be conceded that the allegations in the affirmative defense as to where the contract was executed are not as specific and certain as they might have been made, yet, for the purposes of this demurrer, we think that, aided as they are by reference to the statutes, they sufficiently indicate that the contract of insurance was not completed until the policy was delivered and accepted in New York.

By an act of the legislature of that state, approved June 7, 1890, which is an amendment of former laws on the same subject, it is provided that—

“Any person, acting for himself or for others, who solicits or procures policies or certificates for or from any company or association that has not complied with this

Mar. 1894.] Opinion of the Court — ANDERS, J.

act, or who in any manner aids such transaction, shall be held guilty of a misdemeanor: *Provided, however*, That the superintendent of the insurance department shall be authorized to issue to citizens of this state, in consideration of the yearly payment of two hundred dollars, a license which shall be subject to revocation at any time, to act as agent or agents and procure policies of fire insurance for themselves or others on property in this state in companies which have not complied with the laws of this state. . . . It is further provided that all fire insurance policies issued to residents of this state on property located herein, by companies that have not complied with the requirements of the general insurance laws of the state shall be null and void, and of no force or effect whatever, except such as have been procured in the manner in this act provided."

As we have shown above, the answer avers in effect that the policy of insurance in question was issued, delivered and received in violation of the above quoted statute and others, and was not procured in the manner in said laws provided or authorized. This, we think, is saying in substance that the contract was executed in New York, and was not procured by a duly licensed broker in that state. And this being so, it follows that the demurrer ought to have been overruled. Of course, we are not called upon to express any opinion as to the merits of this case, and do not do so. We simply decide the question raised by the pleadings, which is purely a question of law. If, as a matter of fact, the insurance was effected in New York by a licensed broker, it is valid even in that state; and if the contract was really executed elsewhere its validity will not, as we have before stated, be determined by the laws of New York.

Appellant's second objection that the judgment is excessive in that it included interest on the amount found due from the time the same became payable, in our opinion, is without merit. Interest on money detained after it is due and payable is recoverable as matter of legal right. 1 Sutherland, Damages (2d ed.), 634.

The judgment is reversed, and the cause remanded with directions to overrule the demurrer to the defendant's affirmative defense.

DUNBAR, C. J., and SCOTT, HOYT and STILES, JJ.,
concur.

[No. 1038. Decided March 13, 1894.]

WILLIAM B. HANNA AND MOLLIE HANNA, *Respondents*,
v. GEORGE M. SAVAGE *et al.*, *Appellants*.

STAY BOND—LIMITED LIABILITY OF SURETIES—TECHNICAL DEFECTS—JUDGMENT AGAINST SURETIES.

Where the sureties in a stay bond given upon appeal expressly limit their liability to sums less than the judgment, the instrument cannot be construed as a joint and several bond for the whole amount of the judgment.

Although the formal requirements of the statute have not been complied with in the execution of a stay bond on appeal, such bond cannot be held void therefor, and the makers allowed to escape responsibility, after the bond has subverted the purpose for which it was given. (STILES and ANDERS, JJ., dissent.)

Where each surety in a stay bond limits his liability to the amount set opposite his name, the fact that the bond recites that the principal and sureties are "jointly and severally" bound thereby must be construed as making each surety jointly bound with the principal to the extent of his limited liability, and does not make him jointly liable with the other sureties for the whole amount of the bond.

It is within the jurisdiction of the supreme court to enter judgment against the principals and sureties upon a stay bond on appeal when affirming judgment against the appellants.

Appeal from Superior Court, Thurston County.

Doolittle & Fogg, C. O. Bates, and Crowley & Sullivan, for appellants.

Allen & Moore, for respondents.

Mar. 1894.] Opinion of the Court—DUNBAR, C. J.

The opinion of the court was delivered by

DUNBAR, C. J.—A joint and several judgment was heretofore rendered in this court in favor of W. B. Hanna and Mollie Hanna, and against George M. Savage, Walter J. Thompson and Henry Drum as principals, and Robert Wingate *et al.* as sureties, for the full amount of the judgment, and this is a petition by the sureties to vacate or modify said judgment.

The following is a copy of the bond:

In the Superior Court of the State of Washington in and for the County of Thurston.

WILLIAM B. HANNA AND MOLLIE	}	STAY BOND ON APPEAL.
HANNA, Plaintiffs,		
vs.		
GEORGE M. SAVAGE, WALTER J.		
THOMPSON AND HENRY DRUM,		
Defendants.		

Know all men by these presents:

That we, George M. Savage, Walter J. Thompson and Henry Drum, as principals, are held and firmly bound unto William B. Hanna and Mollie Hanna in the penal sum forty thousand three hundred dollars (\$40,300); and we, Robert Wingate, M. F. Hatch, Geo. F. Orchard, Edwin Eells, Allen C. Mason, Stuart Rice, Charles S. Reeves, H. C. Wallace, Isaac W. Anderson, A. M. Stewart, F. I. Mead, Abe Gross, W. B. Allen, P. A. Paulson, H. W. Bryer, S. M. Orchard, Abbie A. Eells, as sureties, are each of us held and firmly bound unto said William B. Hanna and Mollie Hanna in the penal sum following each of our respective names, for the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Witness our hands this 24th day of June, 1893.

The condition of this obligation is such that, whereas, on the 12th day of July, 1893, in the above entitled action, a judgment was entered against said defendants and in favor of plaintiffs for the sum of nineteen thousand nine hundred sixty-nine and twenty-five one-hundredths dollars (\$19,969.25) and costs, taxed at ninety and eighty-five

one-hundredths dollars (\$90.85); and, whereas, said defendants have appealed to the supreme court from said order and final judgment, and have served their notice of appeal as required by statute, and it is desired to stay proceedings on said judgment until the hearing and decision of said appeal: Now, therefore, if the said appellants will satisfy and perform the order and judgment in said cause appealed from, if it shall be affirmed, and shall satisfy and perform any judgment or order which the supreme court may render or make, or order to be rendered or made by the superior court, in said action, then this obligation shall be null and void; otherwise to remain in full force and effect.

GEORGE M. SAVAGE.

WALTER J. THOMPSON.

HENRY DRUM.

ROBERT WINGATE, for \$2,000.

M. F. HATCH, for 2,000.

GEO. F. ORCHARD, } 2,000.

S. M. ORCHARD, } 2,000.

EDWIN EELLS, } 2,000.

ABBIE A. EELLS, } 2,000.

ALLEN C. MASON, 5,000.

STUART RICE, 2,000.

CHARLES S. REEVES, 5,000.

H. C. WALLACE, 2,000.

ISAAC W. ANDERSON, 5,000.

A. M. STEWART, 2,000.

F. I. MEAD, 2,000.

ABE GROSS, 3,000.

W. B. ALLEN, 5,000.

P. A. PAULSON, 5,000.

H. W. BRYER, 2,000.

Witnesses: CHARLES A. MURRAY.

E. T. DUNNING.

It is contended by the appellants:

First: That the bond not having been given in accordance with the requirements of the statute is wholly void, and that no judgment can therefore be rendered against the sureties.

Mar. 1894.] Opinion of the Court—DUNBAR, C. J.

Second: That if the sureties can be held at all, they can only be held for the amount set opposite their respective names.

Third: That in any event it is only a common law bond, and judgment can only be entered in a suit on the bond.

While the respondents contend that it is to be construed as a joint and several bond for the whole amount of the judgment. This contention is sustained by *People v. Slocum*, 1 Idaho, 62. Although that case was an action on the bond, yet the principles discussed are the same which are involved here; and, if we considered them sound, we think would be decisive of this case. But we think the court went too far in that case.

It is a generally conceded proposition that where a person has executed a bond, the execution is supposed to be made with reference to the law providing for the requirements of such bond, and that the law governing such cases becomes imported into the contract; but this presumption cannot be indulged further than as an aid in the construction of the contract when there is a doubt as to the extent of the liability incurred, and cannot be invoked to enlarge the liability which is plainly expressed in the contract, or to change the contract which is specifically made, or to render inoperative a specific limitation. The condition of this obligation is plain. It is limited by express words to the sum following the respective names of the sureties, and it is that sum and none other which the respective sureties bind themselves to pay. It seems to us that the language used is not susceptible of construction, and that there is no principle of law which can bind a bondsman for any greater amount than he contracts to pay, whether he be principal or surety.

On the other hand, we cannot endorse the theory urged by the petitioners that the bond, because it has not formally complied with the statute, is absolutely void. We have no doubt of the correctness of the general proposition

urged by the petitioners that the liability of a surety is not to be extended by implication beyond the terms of his contract, but this same principle can be invoked for the protection of the parties to any contract. A bond, like any other contract, must be reasonably construed, and the intention of the contracting parties determined primarily by the language used in the contract itself, and when the language is doubtful, or ambiguous, the circumstances surrounding its execution and the law providing for its execution may, as we have before said, be brought to the aid of the court in its interpretation.

It is doubtless true, also, as urged by the petitioners, that a surety has a right to stand upon the very terms of his contract, and for that matter so has any other man who enters into a contract when the terms of the contract are plainly expressed. In this case the terms of the contract are that each of the sureties is held and firmly bound unto the respondents in the sum following his name, and if he stands upon the very terms of his contract he must be held bound for that amount.

This contract was entered into by the petitioners with the respondents in this case for a purpose; that purpose was to stay the proceedings, and to prevent the respondents from satisfying their judgment out of the property of appellants until the appeal should have been determined. That purpose was subserved by this bond, and we do not think it would be in accord with good morals or the principles underlying fair dealings to allow them now to escape the responsibility which they contracted because the formal requirements of the statute were not complied with in the execution of the bond. This is the doctrine of the California courts, as announced in *People v. Breyfogle*, 17 Cal. 504, and which has been uniformly followed since its announcement in that state, and which seems to us to be a reasonable and just doctrine. There it was held that the expression "jointly and severally bound," which also oc-

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Dissenting Opinion—STILES, J.

curs in the bond in this case, should be construed to mean that each surety was jointly bound with the principal, and not with the other sureties; and inasmuch as each surety in this case has limited his liability to the amount set opposite his name, it conclusively follows that the joint liability cannot be with the other sureties, but must, therefore, of necessity be with the principal.

It is also urged by the petitioners that under the constitution of this state the supreme court has no original jurisdiction excepting in cases of habeas corpus, quo warranto and mandamus as to state officers, and that all of the jurisdiction conferred upon the court is appellate, and that the power to enter judgment against the sureties upon a bond is necessarily an exercise of an original jurisdiction, and therefore without the jurisdiction of this court. This question we determine against the contention of the appellant.

The judgment will, therefore, be modified to the extent of entering a judgment for the whole amount against the principals, and against each surety for the amount set opposite his name in said bond. Execution to issue for the amount of the principal judgment and costs.

HOYT and SCOTT, JJ., concur.

STILES, J. (*dissenting*). — The bond construed in this case was by statute required to obligate each signer for the full amount of the judgment. It was given to stay proceedings. It did not comply with the statute; and it was, therefore, not a good bond, and did not secure a stay. It could have been moved against at any time, and we should have held it not a compliance with the law. Under the circumstances, I am unable to join in rendering judgment against the sureties, when the paper they signed has procured no stay, and was, therefore, without any consideration.

ANDERS, J., concurs.

[No. 1091. Decided March 13, 1894.]

W. M. HULBERT, *Respondent*, v. GEORGE BRACKETT, *Appellant*.

AMENDMENT OF COMPLAINT PENDING TRIAL.

The amendment of plaintiff's complaint during the progress of the trial is a matter within the discretion of the court, and no error can be founded thereon when it appears that no different answer was thereby required; that the defendant was not taken by surprise, and did not ask for time to prepare an answer to the matters covered by the amendment.

Appeal from Superior Court, Snohomish County.

W. R. Andrews, for appellant.

J. A. Coleman, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—The complaint in this case alleges that between certain dates plaintiff was the owner of a lot of saw logs bearing his mark (describing it) of the value of \$210; that he was at all times within said dates entitled to the immediate, actual and open possession of said logs; that during said time said defendant, being in possession of said logs, unlawfully converted the same into lumber and disposed of them to his own use, and sawed and converted the same into lumber and disposed of the said lumber to his own use, and to the damage of plaintiff in the sum of \$210. The answer was a general denial.

During the introduction of plaintiff's testimony he attempted to prove a demand for the logs, which was objected to by appellant on the ground that no demand had been alleged in the complaint. Whereupon, on motion of plaintiff, the complaint was amended by the insertion of the following:

Mar. 1894.] Opinion of the Court—DUNBAR, C. J.

“That on the 18th day of November, 1891, plaintiff demanded possession of said saw logs from said defendant, which was refused and has ever since been refused.”

The allowing of this amendment is alleged as error by the appellant, for the reason, as contended, that it changes the nature of the action. Even if the amendment had been necessary, a question which we do not now decide, under the liberal provisions of our code in relation to amendments, we are satisfied that the court did not abuse its discretion in allowing the amendment objected to. No different answer was required; the defendant was in no way taken by surprise, and the most that he could have claimed would have been time to have prepared an answer to this new pleading, if he deemed any time necessary. No time was asked by him, and we are satisfied that he was not injured in any respect by the insertion of the amendment.

We have examined the instructions objected to by the appellant and the instructions asked by him, which were refused or modified by the court, and construing them with reference to the testimony in the case we think that no error was committed, either in the giving of the instructions, or refusal to give; that the jury could have been in no way misled by any instructions of the court, and that the evidence fully sustains the verdict; and the judgment will, therefore, be affirmed.

ANDERS, STILES, SCOTT and HOYT, JJ., concur.

[No. 1106. Decided March 13, 1894.]

W. C. WEEKS, *Respondent*, v. VIRGINIA BUSSELL, *Appellant*.

NEGOTIABLE INSTRUMENTS—ACCOMMODATION PAPER—INSTRUCTIONS.

In an action upon a promissory note against two makers thereof, where the issue made by one is that she executed the note without a consideration as an accommodation maker and for the sole purpose of enabling plaintiff to borrow money thereon for his own use and benefit, a charge to the jury to find for plaintiff if there was a consideration moving to either one of the makers is erroneous.

Appeal from Superior Court, King County.

Benson & Morris, for appellant.

Wilshire & De Steiguer, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—Respondent brought this action at law against appellant and against one E. L. Gustin, and recovered a judgment against both for the amount claimed in the complaint. Defendant Gustin failed to appear in the case and her default was duly entered. She does not join in this appeal. The action was brought on a promissory note executed by appellant and said Gustin, which was drawn in favor of, and was delivered to, respondent. Respondent's complaint is in the usual form, and sets out the note in full. The answer of the appellant alleges that she executed and delivered the promissory note aforesaid as an accommodation note to the plaintiff, and without consideration; that she so executed and delivered the said note for the sole purpose of enabling the plaintiff to borrow money thereon for his own use and benefit, and for no other purpose whatever.

Mar. 1894.] Opinion of the Court—DUNBAR, C. J.

The court, among other things, instructed the jury as follows:

“The court further instructs you that, if you find there was a consideration moving to E. L. Gustin for the giving of this note, or to this defendant who is defending here, Mrs. Bussell, you will find for the plaintiff; or if you find there was a consideration moving to only one, Mrs. Gustin, if you find she was indebted to the plaintiff for goods sold and delivered, as plaintiff claims in this case, it is immaterial whether the defendant Bussell also was indebted for those goods. The question is, was there a consideration moving to the defendants, or either of them, for the execution and delivery of this note. If there was, find a verdict for the plaintiff.”

This instruction was duly excepted to by the defendant, Virginia Bussell, and is alleged here, among other things, as error. This instruction was so manifestly erroneous that discussion seems to be almost superfluous. The main question at issue, so far as the defense of appellant was concerned, was whether or not she was an accommodation endorser. There was competent testimony introduced which tended at least to show that her endorsement was an endorsement of that character only, and the jury had a right to pass upon the credibility of this testimony, but such right was taken from the jury, and the testimony excluded from their consideration by the instruction of the court, that they should find for the plaintiff if they found that there was a consideration moving only to Mrs. Gustin.

It is argued by the respondent that a surety could never be bound if the appellant could not be bound in this case. But the difference between a surety and an accommodation endorser, where the action is brought by the original payee, is so marked and distinct that the citation of authorities to distinguish them, it seems to us, is unnecessary. The court plainly took from the consideration of the jury a legal defense which the appellant in this action had a right to

make, and which would have been a complete defense to the action had it been true. Whether or not it was true, it was the province of the jury to decide.

The instruction being erroneous, the case will be reversed and remanded for a new trial.

STILES, SCOTT and ANDERS, JJ., concur.

HOYT, J. (*dissenting*).—In my opinion, the undisputed proofs showed that appellant executed the note as a joint maker for value, and not as an accommodation to the payee, and that the court committed no error in giving the instruction complained of.

8	442
11	123
36*	266
39*	375
8	442
131	622
21	623
21	627
8	442
122	466

[No. 1149. Decided March 13, 1894.]

Z. C. MILES COMPANY, OF SEATTLE, WASHINGTON, *Appellant*, v. F. GORDON *et al.*, *Appellants*, R. P. MATHEWS *et al.*, *Respondents*.

PARTNERSHIP — WHAT CONSTITUTES — MECHANICS' LIENS — REPAIRS
BY LESSEE — WHEN OWNER NOT BOUND.

Partnership between the lessor and the lessees of premises is not constituted by an agreement that the lessor shall have as rent therefor one-half of all the profits realized above expenses by the lessees in managing the premises as a sanitarium, although the agreement may provide that the board and lodging of the families of the lessees while residing on the premises and engaged in said management, and their necessary personal expenses while engaged therein, may be included in computing expenses, "but they are to receive no other compensation for their services," when all the other terms of the agreement indicate that it was intended by the parties as a lease.

The liens of mechanics and material men for labor performed and material furnished in the alteration and repair of a building at the instance of a lessee thereof attach only to the leasehold interest, and do not bind the owner, in the absence of authority to the lessee to act as his agent.

Mar. 1894.] Opinion of the Court—DUNBAR, C. J.

Appeal from Superior Court, King County.

Wiley & Bostwick, for appellant.

John P. Fay, C. H. Gest, and W. T. Scott, for respondent Northwestern Trust Company.

The opinion of the court was delivered by

DUNBAR, C. J.—This is an action to foreclose a material man's lien on block fifteen, of East Seattle. The appellant Z. C. Miles Company furnished materials and performed labor in the alteration and repair of the building known as the Hotel Calkins, in putting in a steam heating plant. The defendant Northwestern Trust Company being the owner of the property sought to be charged, entered into an agreement with the defendants H. T. Turner and R. P. Mathews to operate the East Seattle Sanitarium. Mathews and Turner, finding that the building was unsuitable for the business in which they were engaged, that of caring for the sick, informed Mr. Baird, who it is claimed represented the Northwestern Trust Company, of the fact that they intended to put in a steam heating plant, and asked Mr. Baird if the Northwestern Trust Company would not advance three hundred dollars to assist in making the improvement. Mathews and Turner afterward withdrew this application, stating that they could get along without the assistance of the Northwestern Trust Company, and ordered the materials from the Z. C. Miles Company, and proceeded to put in the steam heating plant. Z. C. Miles Company failing to get their pay filed their lien. C. N. Workman, a carpenter, and Frank Gordon, a plumber, also did some work on the improvement and filed a lien for the same. The court below rendered a judgment in favor of the respondent Northwestern Trust Company, from which judgment an appeal was taken to this court.

There are some objections to the liens filed in this case

urged by the respondents which it is not necessary for us to discuss, as the view we take of the question which lies at the threshold of the case obviates that necessity. It becomes necessary to construe the agreement between the Northwestern Trust Company and Mathews and Turner. This agreement, respondents contend, is a lease, while appellant's contention is that it is a partnership agreement, and that, the Northwestern Trust Company being partners under that agreement with Mathews and Turner, they are responsible for the improvement made. That portion of the agreement which it is necessary to review is as follows:

“This agreement, made and entered into this 8th day of December, A. D. 1891, by and between ‘Northwestern Trust Company, of Seattle,’ a corporation duly organized, existing and doing business under the laws of the State of Washington, hereinafter called the party of the first part, and R. P. Mathews and Henry T. Turner, of Seattle, King County, Washington, parties of the second part:

“Witnesseth, that for and in consideration of the terms, agreements and covenants hereinafter made by said second parties, the said first party does hereby lease, demise and let unto the said second parties the following described premises, property, rights and easements, situate in the county of King, and State of Washington, to wit:

“All of blocks numbered fourteen, fifteen, sixteen and thirty-seven, in East Seattle, according to the plat thereof on file and of record in the office of the county auditor in and for said county of King, and the buildings known as the ‘Hotel Calkins,’ with the furniture, fixtures and appurtenances therein, and together with the electric power house and dynamo and other machinery therein, and all other buildings and improvements of whatsoever nature upon said described blocks. Together with the right to take water from the spring in what is known as ‘Maple Place’ for use on said leased premises, and the right to maintain pipes, conduits and other convenient means for the purpose of conducting water from said spring to a neighboring street; and the right of access and use and

Mar. 1894.] Opinion of the Court—DUNBAR, C. J.

right-of-way to said spring from such street, convenient for effecting the foregoing rights, and the use of said water and the maintenance of said pipes, conduits and other means of conducting said water; said spring being the same now supplying water for said premises. Together with all hereditaments and appurtenances thereunto belonging, excepting only a certain building situated on block numbered sixteen, aforesaid, known and used as the waiting room at the boat landing.

“To have and to hold the said described premises, property rights and easements unto the said parties of the second part, their heirs, executors, administrators and assigns, for the term of one year from the first day of January, A. D. 1892, to the first day of January, A. D. 1893, to be used as a sanitarium by said second parties.

“Said parties of the second part promise, covenant and agree to pay as rent for said premises, property rights and easements and as full compensation for the use thereof, one-half of the amount realized by them as profits from said use during said term, above all expenses including advertising to an amount not to exceed five thousand dollars per annum, payable at the end of said year. In computing said expenses the board and lodging of said second parties and of their wives while residing on said premises and engaged in said management, and said second parties’ actual necessary personal expenses while engaged upon the business of said sanitarium are to be included; but they are to receive no other compensation whatsoever for their services.”

It seems to us that this agreement cannot be construed to be a formation of a partnership in any sense. It purports to be a lease. It is recited in the instrument itself that it is a lease, and while, of course such recitation would not make it a lease if the elements of partnership were in the agreement, yet it seems to us that these elements are entirely wanting. Leases which provide for a division of the profits are of common occurrence in the business world. This instrument provides that the parties of the second part agree to pay as rent for said premises one-half of the

amount realized by them as profits from said use during said term above all expenses, and the latter part of the paragraph, which is commented upon by appellants, concerning the boarding and lodging of the said second parties and their wives, it seems to us has no tendency to take the agreement out of the catalogue of leases, but is simply an additional and specific agreement of what the expenses shall consist of, or what particular expenses the lessors shall be bound for.

It is true that there is an agreement here to share the profits, but on the other hand there is no agreement to share the losses, which is the ordinary test of a partnership. We know of no reason why a person who has a house, or a farm, or any other character of property which he is desirous of leasing, shall not be allowed to make his own terms as to what the payment shall consist of, whether, in the case of a farm, it shall be for one-half of the gross amount of grain raised, or for one-half of the amount of grain raised after the expense of putting in and harvesting the crop are deducted, or for a certain number of bushels of grain without regard to the amount raised, or for a certain specified sum of money. In each instance the amount agreed upon is intended as a payment for the use of the premises; and in the case at bar it seems that nothing more is imported into this contract than is generally found in contracts of lease.

The contract further provides for a renewal of the lease for the term of five years at the option of the lessees; for the yearly rental of said premises and property to be paid in case of renewal; for the right of assignment of the leasehold interest, and all the ordinary rights of the lessee in such cases.

We think, from an investigation of the instrument, that it was the intention of the parties to enter into a lease, and not a partnership, and that there is nothing expressed in

Mar. 1894.] Opinion of the Court—HOYT, J.

the instrument which will bind them as partners. Construing, then, the instrument to be a lease, instead of a partnership agreement, Mathews and Turner are in no sense the agents of the Northwestern Trust Company, and can in no way bind them by their contract with the material men or workmen. Their liens could only extend to the right of Mathews and Turner in the property, which was in this case a leasehold interest.

The judgment will, therefore, be affirmed.

STILES, HOYT, ANDERS and SCOTT, JJ., concur.

[No. 1230. Decided March 13, 1894.]

THE STATE OF WASHINGTON, *on the relation of Edward F. Hunter*, v. W. W. LANGHORNE, Judge.

WRIT OF PROHIBITION—PROCEEDINGS FOR CONTEMPT.

An alternative writ of prohibition against a superior judge will be made perpetual to prevent his carrying into effect a void judgment of contempt, when he has refused upon motion to set aside the judgment, although the return to the alternative writ may recite that the court has no intention of further proceeding in the matter. (STILES, J., dissents).

Original Application for Prohibition.

Edward F. Hunter, for relator.

Reynolds & Stewart, for respondent.

The opinion of the court was delivered by

HOYT, J.—At the time of the issuing of the alternative writ, this court determined that the action of the superior court of Lewis county in adjudging the relator guilty of contempt was without jurisdiction, and that the order en-

tered in pursuance thereof was void. Upon the filing of the answer to the alternative writ these questions have been further argued, but our views in regard thereto have not been changed. It follows that the writ must be made perpetual unless the facts set up in said answer are sufficient to show that there is no danger of said order being carried into effect as against the relator. Upon this question the judge of said court returns that it is not his intention to further proceed in the matter, and, if this statement is to have force regardless of the circumstances surrounding the case, it will establish the fact that there is no need of the exercise of the power of this court to prohibit such further proceeding. In our opinion, however, the statement of his intention by the judge must be considered in the light of all the surrounding circumstances, and if such circumstances were and are such as to warrant the belief on the part of the relator that he is in danger of being proceeded against by virtue of said order, he will be entitled to protection against such danger, notwithstanding the fact that there may have been in the mind of the judge an intention not to so proceed. The answer in no way establishes the fact that such action had been taken in the court below or such expressions made by the judge of said court as to show that there was no danger of anything further being done in the premises. Such being the fact, we think the relator was entitled to act upon what would reasonably be inferred from the circumstances, uninfluenced by any intention which may have been lodged in the mind of the judge. The circumstances not only fail to show that there was no intention on the part of the court to proceed further in the matter, but therefrom the contrary fairly appears.

Viewed in the light of the answer of the respondent, there is no reason why the motion of the relator that the order in question should be set aside should not have been granted, and the fact that the court denied such motion

Mar. 1894.]

Syllabus.

warranted the relator in assuming that it intended to proceed in the enforcement of the same. This being so, he was justified in appealing to this court for protection. If the court has no intention to further proceed in the enforcement of the order, no harm will be done to any one by having the alternative writ made perpetual, while, if the fears of the relator, as shown by his petition and affidavits, are well founded, it is necessary that the court should be prohibited to prevent the relator from being annoyed by an order which is absolutely void.

For these reasons we think the writ should be made perpetual.

DUNBAR, C. J., and SCOTT and ANDERS, JJ., concur.

STILES, J. (*dissenting*).—I think the respondent's answer sufficiently showed that whatever may have been his purpose when the order was made, that purpose has now passed into the realm of sudden and forgotten impulses, and the proceeding should be dropped.

[No. 1131. Decided March 15, 1894.]

THE TOWN OF ILWACO, *Respondent*, v. R. C. MILLER, *Respondent*, AND FRED. COLBERT, *Appellant*.

MALICIOUS PROSECUTION—LIABILITY OF COMPLAINING WITNESS
FOR COSTS.

The superior court has no authority, upon the acquittal of a defendant in a criminal case, to enter judgment for costs against the complaining witness, although the court may find that the complaint is frivolous and without probable cause.

Appeal from Superior Court, Pacific County.

T. J. Clark, for appellant.

The opinion of the court was delivered by

ANDERS, J.—The defendant, R. C. Miller, was tried and convicted, before the police justice of the town of Ilwaco, of assault and battery, upon a complaint filed by the appellant, Fred. Colbert. From the judgment rendered against him the defendant appealed to the superior court of Pacific county, where, by consent of parties, the cause was tried by the court without a jury, and resulted in an acquittal of the defendant.

The trial court being of the opinion that the complaint was frivolous and without probable cause, thereupon entered judgment that the appellant, as prosecuting witness, pay the costs of the action, amounting to \$95.50, and stand committed until the payment thereof, and that execution issue therefor. We are aware of no law in this state under which this judgment can be sustained. The provisions of our statute authorizing the taxing of costs against complaining witnesses apply only to cases of examinations before magistrates, and to complaints submitted to grand juries for their investigation. See Code Proc., §§1575, 1588, and Gen. Stat., §3050 (Code 1881, §2103). A judgment similar to the one in hand was declared void by this court in the *Permstick* case, 3 Wash. 672 (29 Pac. 350), and we perceive no reason to be dissatisfied with that decision.

Judgment reversed.

DUNBAR, C. J., and SCOTT, STILES and HOYT, JJ.,
concur.

[No. 1044. Decided March 20, 1894.]

EDWARD G. BICKERTON *et al.* v. L. R. GRIMES, *Auditor of the State of Washington.*

SCHOOL LANDS—EXPENSES OF SALE—SERVICES OF AUCTIONEER.

Under Laws 1889-90, p. 441, requiring county commissioners to make sales at public auction of school lands, and providing payment for their services and necessary expenses, the commissioners are not authorized to include in the expense account the commission of professional auctioneers employed by them to cry the sales.

Original Application for Mandamus.

William H. Moore, for petitioners.

James A. Haight, for respondent.

The opinion of the court was delivered by

STILES, J.—The petitioners have had certified, by the commissioners of King county, a considerable sum as expenses incurred in the sale of school lands, and have demanded of respondent that he issue a warrant for the same, which he refuses.

The commissioners, assuming to act within the scope of their authority in the premises, made a contract with petitioners, who were professional auctioneers, for their services in crying auction sales of school lands in their county at a commission of two per cent. of the first one thousand dollars of each day's sales, and one per cent. upon the balance of such sales. The sales continued through six days; the sales of each day amounted to more than one thousand dollars, and the gross sales were \$256,285.13. The commission demanded was \$2,622.84.

The statute (Laws 1890, p. 441, § 9) requires the county commissioners to make these sales, and provides payment for their services. It also permits them to include in their

account rendered to the school land commission their necessary expenses. Nothing is said about employing auctioneers, but it is claimed that the general rule of law that an agent has an implied authority to do whatever is usually necessary in the business confided to him should apply. If it were a fact, within general knowledge, that a sale of land at public auction could only be made, or well made, by a professional auctioneer, there might be something in this contention; but, as at present advised, we are unable to see why one person could not do such work as well as another. The law seems to have been framed with the same view, and we, therefore, hold with the respondent in refusing the demand. It is the duty of the commissioners to make sales, and their per diem covers all allowable expenses connected therewith.

Petition denied.

DUNBAR, C. J., and HOYT, ANDERS and SCOTT, JJ.,
concur.

[No. 1090. Decided March 20, 1894.]

F. M. KOHLER, *Appellant*, v. FAIRHAVEN AND NEW WHAT-
COM RAILWAY COMPANY, *Respondent*.

NEW TRIAL — EXCESSIVE DAMAGES — DISCRETION OF COURT.

It is a matter within the discretion of the trial court to grant a new trial on the ground that the damages awarded by the verdict of the jury are excessive, and the ruling of the court thereon will not be interfered with, unless it appears affirmatively from the record that such discretion has been improperly exercised. (DUNBAR, C. J., dissents.)

Although an order granting a new trial has been made contingent upon the plaintiff's remitting a portion of the verdict, which he refuses to do, the plaintiff is not entitled on appeal, when no error

8	452
9	247
36*	253
36*	681
37*	298
8	452
15	253

8	452
26	112
26	113

8	452
28	621

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Opinion of the Court—Hoyt, J.

is found in the action of the lower court, to a reversal of the order conditioned upon his remitting such portion of the verdict as may seem just to the appellate court.

Appeal from Superior Court, Whatcom County.

I. N. Maxwell, for appellant.

Wiley & Bostwick, for respondent.

The opinion of the court was delivered by

Hoyt, J.—Appellant brought his action against the respondent for personal injuries. The jury returned a verdict in his favor for the sum of five thousand dollars. Motion for a new trial was made by the defendant, and granted by the court, on the ground that the damages were excessive. From the order granting such motion plaintiff has prosecuted this appeal.

Under the provisions of our statute it is made the duty of the trial court, when a proper motion has been interposed, to determine the question as to whether or not the damages awarded by the jury are excessive. In performing this duty the court must determine as to the effect of the evidence introduced in the course of the trial. From such evidence it must, as a question of judicial discretion, determine whether or not the damages as assessed by the jury are so excessive as to make it to appear that they were awarded under the influence of passion or prejudice.

It is a universal rule that when a matter is left to the discretion of a court, its exercise of such discretion will not be interfered with by an appellate court unless it is made affirmatively to appear from the record brought up on appeal that such discretion has been improperly exercised. We see no reason for holding that in exercising the particular discretion vested in a trial court in determining as to whether or not there should be a new trial its decision should be given less force than in other matters, for while

it is true that the verdict of a jury is presumably warranted by the evidence until the contrary is made to appear, the statute has made it the duty of the lower court to review their action, and when it has done so, and in the exercise of the discretion vested in it, determined that it was not warranted, the presumption as to its correctness is taken away, and the decision of the court must stand unless the appellate court is satisfied from all the circumstances surrounding the case that in so deciding the court made a mistake.

We have carefully examined all the evidence upon which the verdict of the jury was founded, and from a consideration thereof are not satisfied that the action of the trial court was not what it should have been. Such court was in a better situation to determine the question as to the effect to be given to the evidence than is this court. We should not interfere unless the mistake of the trial court is made clearly to appear. This should be the rule in regard to all orders made by a trial court, but especially so as to one granting a new trial. Such an order does not conclude the rights of the party against whom the ruling is made. It simply casts upon him the burden of again submitting his case to a jury, whereas if the appellate court should reverse the order its decision would conclusively determine the rights of the parties.

An appellate court should be slow to do this when, in order to so conclude the rights of the parties, it has to overrule the decision of a trial court as to a question which it was in the better situation to decide. The evidence to support the verdict in question was of such a nature that it furnished grounds for the exercise of discretion on the part of the trial court, and there is nothing to satisfy us that such discretion was not properly exercised.

The order must be affirmed.

STILES, SCOTT and ANDERS, JJ., concur.

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On Petition for Re-hearing.

DUNBAR, C. J. (*dissenting*).—I dissent. The plaintiff has a constitutional right to have the questions of fact involved in his case submitted to the discretion of a jury. The amount of damages which he sustained is as purely a question of fact as any question in the case. I do not deny the right of the court to set aside a verdict when it plainly appears that the verdict was the result of passion or prejudice; but I do most earnestly protest against the court substituting its judgment for the judgment of the jury; and basing its conclusion that the jury was controlled by passion or prejudice on the simple fact that the verdict rendered by the jury was a larger verdict than the court would have rendered if the question had been originally submitted to its discretion. Such an assumption by the courts virtually annuls the right of trial by jury. Practically the question of damages may as well be submitted to the court in the first instance.

ON PETITION FOR RE-HEARING.

HOYT, J.—Defendant in the court below made a motion for a new trial, and the court made an order that the motion be granted unless the plaintiff within a time named should remit a certain amount of the verdict; this the plaintiff declined to do, and the motion for a new trial was entered. This court, upon the hearing of the appeal from said order, being of the opinion that it was rightfully made, affirmed it. The appellant, in his petition for re-hearing, asks this court to allow him the option of remitting such portion of the verdict as to it may seem just, and, upon his doing so, to reverse the order granting a new trial, and to direct a judgment in his favor for the amount of the verdict less the sum so remitted. That an appellate court often makes its reversal of a judgment or order contingent upon the action of one or the other of the

parties is beyond question. The reason for so doing is that error is found which justifies such reversal, but of such a nature that the party against whom the erroneous ruling was made can be compensated. But this principle cannot apply in the case at bar, for the reason that no error is found in the action of the lower court upon which to found a reversal of the order. This court has found that the lower court could not have done otherwise than to have entered the order which it did, and for it thus to find and then hold that such order should be reversed at the option of the appellant would be illogical and not in accord with our idea of a proper practice.

There is another reason why, under the circumstances of this case, this court cannot comply with the request of the petition for re-hearing. For aught that appears from the record there may have been such errors of law against the defendant as would have entitled it to a new trial, and would have required of this court a reversal of an order denying such new trial if the appellant had remitted as required by the lower court, and thus secured such an order. The appellant not having remitted, and the motion for a new trial having been granted, the errors of law, if any, of which the respondent could have availed itself were not here for review. For this reason if we should now do what we are asked, the result will be that the defendant, without any fault on its part, would be deprived of rights which it might have, growing out of errors of law occurring at the trial. If the plaintiff had seen fit to remit in the court below, the defendant could have accepted such remittance, and allowed the order denying the motion for a new trial based thereon to stand, or it could have prosecuted its appeal from such order on the ground that there had been such errors committed as entitled it to have the verdict set aside, and its motion for a new trial granted; but the offer of the plaintiff to remit here, and upon such remittal to

Mar. 1894.] Opinion of the Court — STILES, J.

have this court make an order denying defendant's motion, would deprive it of the benefit of a new trial without its right thereto having been passed upon.

The petition must be denied.

SCOTT, ANDERS and STILES, JJ., concur.

[No. 1158. Decided March 20, 1894.]

A. J. WALLACE, *Appellant*, v. SKAGIT COUNTY, *Respondent*.

8 457
422 108

COUNTIES — CONSTRUCTION OF DITCH — NECESSITY FOR TAKING
BOND FROM CONTRACTOR.

The construction of a local ditch is not such a county improvement as to require the county commissioners to take a bond from the contractor, under Gen. Stat., §2415, for the protection of laborers.

Appeal from Superior Court, Skagit County.

Frank Quinby, and Fermer Pushor, for appellant.

Wells & Joiner, for respondent.

The opinion of the court was delivered by

STILES, J. — Appellant is seeking to hold the county of Skagit responsible for the default of a contractor in not paying the wages of his laborers, the commissioners not having taken a bond as required by Gen. Stat., §2415. The work contracted for was a local ditch, under Gen. Stat., title 21, ch. 1. We agree entirely with the court below that the construction, of ditches under these laws is not a county improvement, but a purely local one, in which all expenses are payable by the district benefited, and the commissioners act as statutory agents of the improvers. *Board, etc., v. Fullen*, 111 Ind. 410 (12 N. E. 298); *Little*

v. Board, 34 N. E. 499 (Ind.); *Dashner v. Mills Co.*, 55 N. W. 468 (Iowa).

The public is not interested in the matter, and the statute with regard to bonds has no application to such cases.

Judgment affirmed.

DUNBAR, C. J., and HOYT, ANDERS and SCOTT, JJ.,
CONCUR.

[No. 887. Decided March 24, 1894.]

CLARENCE M. BARTON AND C. T. CONOVER, *Respondents*,
v. CHARLES H. SPINNING AND MILDRED D. SPINNING,
Appellants.

SPECIFIC PERFORMANCE—INDEFINITE CONTRACT—SUFFICIENCY OF
EVIDENCE.

A contract for the purchase of lands at the expiration of one year from date in consideration that the parties of the second part "will, through the *Tacoma Ledger*, use their best endeavors to advance the value of said lands," and other lands of the party of first part in the vicinity thereof, is not founded upon a consideration which can be specifically enforced, owing to its indefiniteness, and, consequently, does not afford a sufficient consideration to support an action for specific performance in behalf of the parties of the second part.

Where an option for the purchase of lands one year from date was given in consideration of the plaintiffs' using their best endeavors to advance the value of adjacent lands through the columns of a daily paper upon which they were employed, plaintiffs are not entitled to a decree of specific performance when the proofs show that it was beyond their power to make such use of the columns of said paper as was contemplated by the contract, and that they refused when requested to perform their part of the contract, whereupon they had been notified that the option was no longer in force.

Appeal from Superior Court, Pierce County.

Stevens, Seymour & Sharpstein, for appellants.

James M. Ashton, and *Thad. Huston*, for respondents.

Mar. 1894.] Opinion of the Court—HOTT, J.

The opinion of the court was delivered by

HOTT, J.—This action was brought to secure the specific performance of a contract in writing by which it was claimed the appellants had agreed to convey certain real estate to the respondents. The material part of said contract was as follows:

“That the said party of the first part, for and in consideration of one dollar, to him in hand paid, and the further consideration that we will, through the *Tacoma Ledger*, use our best endeavors to advance the value of said lands, gives the said parties of the second part an option to purchase a certain forty acres of land described as follows, being in the Territory of Washington and county of Pierce: The northeast one-quarter of the southwest one-quarter of section 3, township 20, north of range 4 east.

“At the expiration of one year from date hereof, the parties of the second part may buy said forty acres of land by payment of twenty-five dollars per acre, payment to be tendered at the office of Theodore C. Sears, attorney, in the city of Tacoma, W. T. Should the party of the first part sell his land adjoining the above described forty acres, and of which the latter is a part, within one year from the date hereof, the parties of the second part shall have the privilege of having their forty acres above described included in the same sale and at the same price, and shall only pay the party of the first part therefor at the rate of twenty-five dollars per acre; or should the parties of the second part not wish to have their forty acres included in said sale, they may at the time secure absolute title therefor by payment of twenty-five dollars per acre to the party of the first part in manner described above. Should the party of the first part plat his land adjoining within one year from date hereof, the parties of the second part shall also cause the above described forty acres to be platted.”

The complaint founded upon said contract alleged that the respondents had tendered payment and were then ready to pay for said land at the agreed price of \$25 per acre. It also alleged that they had performed the other conditions of the contract on their part.

Two questions are presented upon the appeal: *First*, As to the validity of the contract; and, *second*, as to the effect of the proof offered to show a performance thereof on the part of the respondents. As to the first question, it is suggested that the consideration for the option as expressed in the contract is too indefinite to be the foundation of a right of action; that the general statement that the respondents are to use their best endeavors through the Tacoma *Ledger* to advance the value of said lands is not a sufficiently specific agreement on their part; that its performance could not be specifically decreed as against the respondents, and that, for these reasons, it is not a sufficient consideration to support an action for specific performance in their behalf.

The respondents contend that the money consideration to be paid for the land would furnish a sufficient consideration. But an examination of the contract in its entirety shows clearly that the parties contemplated other than a money consideration as the equivalent for the conveyance of the land by the appellants to the respondents. There was no obligation on their part to take the land and pay therefor the agreed cash price. They did not bind themselves to do anything.

Such being the terms of the contract, the cash price to be paid for the land had nothing to do with the consideration for the option to purchase. The entire consideration for such option was that which the respondents were to do and have done to advance the value of the lands to be conveyed, and other lands of the appellants in that vicinity. It is true that there was the payment of one dollar stated in the contract, but it is evident that this was not the consideration which induced its execution. The real consideration was the benefit expected from the use of the columns of the *Ledger*, and if such use had been so defined as to make it certain, it would no doubt have been a good consideration. It was not so defined, but was left so indefinite that no legal right or obligation could be founded thereon.

Mar. 1894.] Opinion of the Court—Hoyt, J.

The terms of the contract were not aided by the proofs. On the contrary, it affirmatively appeared therefrom that the respondents were unable to do the little required of them, if the contract could be so construed as to make it binding upon the parties thereto. If it could be so construed, it would appear therefrom that the parties assumed that the respondents were in a situation to control the columns of the *Ledger* for the purpose of causing such articles to appear therein as would advance the price of property in the part of the city where these lands were situated, and especially the locality covered by the land owned by the appellants at the time of making the contract. The proofs fail to show that respondents caused the columns of the *Ledger* to be used for that purpose to the extent contemplated by the parties to the contract; on the contrary, they fully establish the fact that it was beyond their power to make such use of said columns. Hence, the consideration for the option failed, even if, as expressed in the contract, it was a good one.

The respondents having failed to comply with their part of the contract for the option cannot, of course, compel a performance by the other party. Not only was it made to appear by the proofs that they failed to comply with their contract in that regard, but it further appeared therefrom that they were properly requested to perform their part of the contract and that they refused; whereupon appellants duly notified them that their option was no longer in force.

The judgment must be reversed, and the cause remanded with instructions to dismiss the action.

STILES, SCOTT and ANDERS, JJ., concur.

DUNBAR, C. J., not sitting.

[No. 1141. Decided March 24, 1894.]

THE STATE OF WASHINGTON, *Respondent*, v. MOSES
ACKLES, *Appellant*.

ASSAULT WITH INTENT TO MURDER—INFORMATION—EVIDENCE—
INSTRUCTIONS—VERDICT.

In an information charging a crime, useless allegations cannot destroy the legal effect of necessary averments.

An information charging that the accused "did unlawfully, purposely and of his premeditated malice, and with intent to murder, assault and shoot one Benjamin Franklin with a deadly weapon," etc., sufficiently charges an assault with intent to commit murder in the second degree, as, under Code Proc., §1243, allowing other words conveying the same meaning as the statutory words to be used, the place of the statutory word, "maliciously," is supplied by the words, "of his premeditated malice."

Upon the trial under such an information, it is not error for the court to refuse to charge the jury that before they could find defendant guilty, they must find that the shooting was done purposely and of his premeditated malice, as premeditation is not an element of the crime charged.

Under an information charging the accused with an assault with an intent to commit murder, a verdict finding him "guilty of assault with a deadly weapon with intent to do bodily harm," is erroneous, as such verdict convicts him of an offense other than the one alleged in the information.

Error arising upon a ruling of the court in regard to the right of argument cannot be urged on appeal after waiver at the trial.

In a prosecution for assault with intent to commit murder, evidence of quarrels and disputes between the defendant and the person assaulted, prior to the assault, is competent as tending to show ill will and motive.

Appeal from Superior Court, Clallam County.

W. R. Gay, and George C. Hatch, for appellant.

D. W. Bryan, Prosecuting Attorney, and James A. Haight, for The State.

8	463
9	692
36*	597
38*	751
8	462
17	512
8	462
19	37
8	462
22	274
8	462
23	551
8	462
25	294
8	462
41	244
41	245
41	246

Mar. 1894.] Opinion of the Court—ANDERS, J.

The opinion of the court was delivered by

ANDERS, J.—The information upon which the appellant was tried in the court below, omitting formal parts, was as follows:

“Comes now D. W. Bryan, prosecuting attorney for said Clallam county, State of Washington, and now informs the court, by this information, that the above named Moses Ackles is guilty of the crime of assault with intent to commit murder, committed as follows: The said Moses Ackles did, on or about the 12th day of January, A. D. 1891, in the county of Clallam, State of Washington, unlawfully, purposely and of his premeditated malice, and with intent to murder, assault and shoot one Benjamin Franklin with a deadly weapon, namely, a Colt's rifle, loaded with powder and leaden balls, which he, the said Moses Ackles, then and there held in his hands, said leaden ball or balls striking the said Benjamin Franklin in the right arm, with intent to murder the said Benjamin Franklin.”

To this information the defendant interposed a demurrer on two grounds: *First*, That the words, “and of his premeditated malice,” were unnecessary and prejudicial, and, *second*, that the information failed to charge a crime.

As to the first objection it is only necessary to observe that, even if it were conceded that the words objected to were unnecessary and surplusage, it could not be said that the information was thereby vitiated, for useless allegations cannot destroy the legal effect of necessary averments. In order to properly charge the crime of which the defendant was accused, it was necessary to allege the doing of such acts as would have constituted murder either in the first or second degree if death had resulted therefrom. Even rejecting the word “premeditated,” which was clearly useless, there still remain in the information sufficient allegations of fact to charge the defendant with the commission of an assault with intent to commit murder in the second degree, which is the killing of another purposely

and maliciously, but without deliberation and premeditation, which latter words are used in defining murder in the first degree. Penal Code, § 3. Our statute provides that words defining a crime need not be strictly pursued in an information, but other words conveying the same meaning may be used. Code Proc., § 1243. As the difference between the meaning of the words "of his premeditated malice," and the single word "maliciously," which is used in the statute defining murder in the second degree, is one of degree merely, and not of substance, it follows that appellant's second objection to the information cannot be sustained, and that the demurrer was properly overruled.

Upon the trial of this cause the jury returned the following verdict: "We, the jury in the above entitled cause, do find the defendant guilty of assault with a deadly weapon with intent to do bodily harm." It is contended on behalf of the appellant that the latter was convicted of a crime not charged in the information, and therefore unwarranted by law. On the other hand the respondent insists that assault with a deadly weapon with intent to do bodily harm is *necessarily* included within the offense charged in the information, and is consequently an offense of which the jury had a right to convict, under § 1320 of the Code of Procedure. While it is true that the jury may find a defendant not guilty of the crime charged, but guilty of an offense of lesser degree, or of an offense necessarily included within that charged, it is also true that "accusation must precede conviction," and that no one can legally be convicted of an offense not properly alleged. The accused, in criminal prosecutions, has a constitutional right to be apprised of the nature and cause of the accusation against him. Const., art. 1, § 22. And this can only be made known by setting forth in the indictment or information every fact constituting an element of the offense charged. This doctrine is

Mar. 1894.] Opinion of the Court—ANDERS, J.

elementary and of universal application, and is founded on the plainest principle of justice. Tested by this rule we think the verdict and judgment in this case were erroneous, and must be set aside. Under our statute, an assault with a deadly weapon with intent to inflict upon the person of another a bodily injury is made a felony only upon the express condition that the assault is without considerable provocation, or where the circumstances of the assault show a willful, malignant and abandoned heart. Penal Code, § 23. And where an act is punishable in a particular manner, under certain conditions, these conditions must be set forth so as to show that the act is punishable. 1 Whart. Crim. Law, § 192.

At common law an assault with a deadly weapon was a misdemeanor only, but, as above intimated, the legislature of this state has made it a felony, punishable by imprisonment in the penitentiary, when perpetrated with intent to inflict bodily injury, under the circumstances and conditions prescribed by statute. And in order to charge this statutory felony it was necessary to set forth in the information, not only that the assault was with a deadly weapon with intent to inflict bodily injury, but the further fact that it was without considerable provocation, or that it was the impulse of a willful, abandoned and malignant heart. This was not done in this instance, and appellant was therefore convicted of, and sentenced to the penitentiary for, a crime of which he was not charged, either in the language of the statute or in language of similar import. *People v. Casey*, 72 N. Y. 393; 2 Bish. Crim. Proc., §§ 63, 63a. The defendant's objection to the reception of the verdict was well taken. He might have been convicted upon this information of an assault with intent to commit murder or of simple assault, or of assault and battery, for those offenses were sufficiently charged under the provisions of the statute.

The defendant requested the court to instruct the jury that before they could find him guilty of the crime charged in the information they must find that the shooting was done purposely and of his premeditated malice, which the court refused to do, and which refusal is assigned as error. There was no error in the ruling of the court. As we have already seen, if the shooting was done purposely and maliciously the defendant might have been convicted of the crime charged even though there was no *premeditated* malice. But the trial court did, inadvertently no doubt, err in attempting to charge the jury as to the law concerning the lesser offenses included in the information, and especially in directing the jury that they might, if satisfied by the evidence beyond a reasonable doubt, render such a verdict as they did render in this case.

Counsel for appellant state in their brief that, "upon the argument of the case, the prosecuting attorney opened for respondent, and addressed the jury. Thereupon the defendant asked the court to charge the jury, as he did not care to answer the prosecuting attorney. Counsel for the state insisted that they had the right to further argue the case. To this the appellant objected; the court overruled the same, and appellant then, rather than submit the case, argued it, and the assistant prosecuting counsel closed it." Appellant claims that the court thus committed error, for the reason that he had a right to submit the case without argument, and the state had nothing to close at that time. But it would appear from the above statement that if he had the right claimed, he elected to waive it, and therefore his exception to the ruling of the court cannot now be urged as error.

Whether a defendant, under all circumstances, can, by waiving argument, after the opening argument has been made, prevent the plaintiff from making his closing argument to the jury, is a question which it is not necessary to

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Syllabus.

determine in this case. Mr. Thompson, in his work on Trials (vol. 1, §936), seems to favor the rule that it is a matter which is addressed to the sound discretion of the trial court.

It is further contended by appellant that the court wrongfully permitted the state to introduce evidence of quarrels and disputes which occurred between the defendant and Franklin at various times prior to the alleged assault. This testimony, we think, was competent as tending to show ill will on the part of the defendant towards Franklin, and as evidence of a motive for assaulting him.

The evidence in the record as to the county wherein the alleged offense was committed is extremely meager and unsatisfactory.

Some other objections are presented by the appellant, but as the same questions are not liable to arise on a new trial, we will refrain from discussing them at this time.

The judgment is reversed, and the cause remanded for a new trial.

DUNBAR, C. J., and HOYT, SCOTT and STILES, JJ., concur.

[No. 1173. Decided March 24, 1894.]

THOMAS GARNEAU *et al.*, Respondents, v. THE PORT
BLAKELY MILL COMPANY, Appellant.

LOGGERS' LIENS—EFFECT OF REPEAL OF STATUTE—ENFORCEMENT
OF LIEN—EVIDENCE—PLACE OF CUTTING—CORPORATE EXIST-
ENCE—ORIGINAL LIEN NOTICE—TIME CHECKS—DECREE—AT-
TORNEY FEES—DAMAGES FOR ELOIGNMENT.

A statutory right of lien given loggers for labor in getting out logs becomes such a part of the contract for such labor as to be unaffected by the repeal of the statute pending the enforcement of the lien.

8	467
8	578
36*	463
36*	466
8	467
12	341
8	467
9	386
36*	463
37*	396
8	467
11	311
36*	463
39*	815
8	467
30	19
8	467
35	654
8	467
38	634

Where the complaint alleges that defendant is a corporation organized and existing under the laws of the state, and the only answer of the corporation is a general denial, it cannot afterwards complain that there was no affirmative proof of its corporate existence.

In an action to enforce a logger's lien, proof must be made that the logs were cut in the county where the lien notice was filed.

As all laws were continued in force and all officers continued in office by Const., art. 27, §§ 2, 6, the county auditor is an officer duly authorized to administer oaths as provided by § 2717, Code 1881.

The original lien notice which has been filed for record and contains the endorsement of that fact together with the volume and page of the record certified under the seal of the county auditor, is admissible in evidence for the purpose of proving that a proper claim of lien had been verified and had been filed for record in the proper office.

In an action to foreclose a logger's lien, time checks given by the employer are competent as evidence even against a third party implicated as defendant on account of some interest in the logs.

Where a number of lien claimants have united in one suit for the foreclosure of their respective liens, an attorney's fee of twenty dollars in each case is not excessive.

Where a large number of lien claimants join in a proceeding for the foreclosure of loggers' liens, and the pleading, proofs and findings establish that each lienor assisted in producing certain logs of which the marks and quantity in feet were given, the decree should set out the logs upon which the several recoveries can be had.

A personal judgment against a third party for the removal of logs beyond the jurisdiction of the county, under Laws 1893, p. 428, authorizing the recovery of damages therefor in the proceeding to foreclose liens, is unwarranted when the act of eloignment was committed prior to the taking effect of said law.

A judgment for damages for the eloignment of logs is unwarranted when there is no proof of the value of the logs.

Appeal from Superior Court, Mason County.

Struve, Allen, Hughes & McMicken, and James Kiefer,
for appellant.

Joseph A. McDonald, for respondents.

The opinion of the court was delivered by

STILES, J. — The loggers' liens involved in this case were filed for record in December, 1892; suit was brought the following January, and the case was tried June 25, 1893. Pending the hearing the legislature passed a new act on the subject, which went into effect before the trial. Laws 1893, p. 428. Sec. 21 of this act repealed all acts and parts of acts inconsistent with its provisions, and contained no saving clause covering existing undetermined liens.

The appellant, which was brought into the foreclosure action as a party having or claiming to have some interest in or claim to the logs, and against whom an alternative personal judgment was rendered, takes the ground that as the right to a lien of this kind is wholly statutory, it is a remedy only, and therefore ceased to exist when the law under which it accrued was repealed. The respondents maintain that it is more than a mere remedy, and is in the nature of a vested right, because the law became a part of the contract under which they went to work and gave the principal defendant credit for their wages, so that the right to maintain and foreclose the lien, if necessary to their payment, could not be taken away by the legislature. They also argue that the new statute is a mere continuation of the former one on the same subject, having in view only a prospective operation, and that it is not inconsistent with any of its provisions to sustain the binding force of an existing lien, although its foreclosure may have to be accomplished under the procedure prescribed by the new law. The question has been decided both ways by the courts of different states, the leading authorities holding that the right of lien is a mere remedy being: *Woodbury v. Grimes*, 1 Col. 103; *Purmort v. Tucker Lumber Co.*, 2 Col. 470; *Bailey v. Mason*, 4 Minn. 546; *Willim v. Bernheimer*, 5 Minn. 288; *Bangor v. Goding*, 35 Me. 74; *Frost v. Ilsley*,

54 Me. 345; *Hanes v. Wade*, 73 Mich. 178 (41 N.W. 222); *Templeton v. Horne*, 82 Ill. 492; *Evans v. Montgomery*, 4 Watts & S. 220; Phillips, *Mechanics' Liens*, § 28. An implication to the same effect was made in *Seattle, etc., R. R. Co. v. Ah Kow*, 2 Wash. T. 43 (3 Pac. 188).

To the contrary are: *Skyrme v. Occidental, etc., Mining Co.*, 8 Nev. 219; *Taylor v. Dahn*, 6 Ind. App. 672 (34 N.E. 122); *Goodbub v. Estate of Hornung*, 127 Ind. 181 (26 N.E. 770); *Florence Gas Co. v. Hanby*, 13 South. (Ala.) 343; *Weaver v. Sells*, 10 Kan. 609; *Steamer Gazelle v. Lake*, 1 Or. 120; *Phillips v. Mason*, 7 Heisk. 61; *Handel v. Elliott*, 60 Tex. 145; *In re Hope Mining Co.*, 1 Sawy. 710; *Wade, Retroactive Law*, § 173; Jones, *Liens*, § 1558.

But it seems to us that a fair distinction can be drawn between those rights of lien which are conceded to be purely remedies, such as attachments, judgment liens and the like, and mechanics' liens, in this: that parties do not make ordinary contracts with a view to the particular means provided for their enforcement, whereas, at common law, one performing labor upon a chattel has an implied lien upon it for the value of his services so long as it remains in his possession. It would not be a very far stretch of the common law lien to extend it over logs, which are chattels, and it is not impossible that such a lien might now exist were it not that in the nature of the thing, logs are of such a character that possession cannot be retained of them and the business of logging progress. But in a country like ours, where the logging business is a principal industry, it is the interest of the public that that business be fostered, as it is, also, that the men who perform labor in that business have some secure means of collecting their wages. Therefore the statutes have expressly extended the laborer's right of lien at the common law to this class of personal property also, and given practically the same remedies for its enforcement, *mutatis mutandis*,

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as the builder of a carriage, the mender of a watch, or any other artisan, has in reference to the thing which he creates or repairs.

Since these laws have been in force we have no doubt that the credit which has been accorded to employers by their men has been very largely based upon the security which the latter have counted upon through the existence of their supposed right to be paid out of the specific things which they have created. When the work is done through contractors, so that the men have no contract relation with the owner of the chattel, the case is somewhat different, and a new principle is introduced, which is exemplified in *Streubel v. Milwaukee, etc., R. R. Co.*, 12 Wis. 74, where laborers upon railroad construction were given the right to sue the railroad company for their wages when the contractors who employed them failed to pay them.

The same principle, as we understand the case, was upheld in *Steamship Co. v. Joliffe*, 2 Wall. 450. In both the cases mentioned it was held that the repeal of the statute did not destroy the *quasi* contract under which the right of action accrued. Upon the authority of the latter case, in the main, *In re Hope Mining Co.*, *supra*, was decided, sustaining a laborer's lien upon mining works after the substitution of a new act which repealed all former laws on the subject. *Handel v. Elliott*, *supra*, sustains the view we have taken, and cites the principal cases on the subject.

We hold, therefore, that the right to a lien was a part of the laborer's contract, and was not affected by the substitute law of 1893.

2. The complaint alleged the appellant to be a corporation organized and existing under the laws of this state, and its only answer was a general denial. A defendant corporation cannot appear generally in an action and afterwards complain that there was no affirmative proof of its corporate existence.

3. The law required that the lien notice should be filed in the county where the logs were cut, and this was a matter that should not have been left to inference and presumption upon the trial. There was no reason in the world why some one of the many witnesses examined should not have stated the blunt fact that these logs were cut in Mason county. But this omission, which was doubtless a mere inadvertence, owing to the fact that a new decree must be entered, will not be permitted to defeat the action.

4. Although some of the lienors, who were unlettered men, stated that they were employed by "the Malaneys," or "Malaney Brothers," it satisfactorily appeared that the real employer was the Washington Improvement Company, whose agents to manage the logging business the Malaneys were.

5. Objection is made that the county auditor was not authorized to administer oaths until 1893, and that therefore the verification of all these liens, which was made before him, was void. County auditors were invested with the power to administer oaths by § 2717, Code 1881, and this law remained in force under the constitution, although the auditor was not mentioned as a county officer in the article on county organization. All laws were continued in force and all officers were continued in office under §§ 2 and 6 of the schedule (Const., art. 27). The salary act of 1890 (Laws, p. 302) did not create the office of county auditor, but merely fixed the salary of an existing officer. The act of 1893 (p. 282, § 6) expressly recognized and amended § 2717 of the Code of 1881.

6. The original notices of lien were in numerous instances admitted by the court to show compliance with the statute in the matter of filing. Each of these notices was endorsed thus:

"I certify that the within instrument was filed for record in the auditor's office of Mason county, by [here fol-

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lows the name of the party filing, the date and hour], and that it is recorded in volume — of lien records of said county, on page [volume and page given].

[Auditor's seal.]

J. W. DAY,

Auditor Mason County, Wash.”

This presents a different case from any heretofore considered by this court. The statement of the certificate is as full as it could be made, and the question is whether, under any circumstances, such a certificate is to be taken as proving the fact of filing and record. Appellant's contention is that only a certified copy can be used for such a purpose; but the statute cited does not bear out the position. Gen. Stat., § 209, makes certified copies of records *prima facie* evidence, but it does not declare that nothing else shall be evidence. An original deed ought, in reason, to be as competent as a copy, and we have yet to ascertain that an original has been rejected. The object sought to be accomplished by the respondents in this case was two-fold: *First*, That they had verified a proper claim or notice of lien; *secondly*, that it had been filed for record in the proper office. The original shows the contents of the instrument and its verification even better than a copy; and it is only left to be determined whether the certificate of the auditor that this particular instrument has been filed for record and recorded is equivalent to his certificate that a writing which he prefixes is a true copy of an instrument of record in a certain volume in his office. Appellant objects that the auditor cannot certify to his version of the contents of a record, but must certify a copy of the record itself. *People v. Lee*, 112 Ill. 113. But in certifying a copy, if he includes therewith the fact of filing, the name of the person presenting the instrument, the date and the book and page of record, he is just so far stating facts which are not a part of the record, strictly, but are gathered from memoranda noted in the book, and from the book

itself. These facts, it is conceded, may be certified by the auditor in connection with his copy, and we are unable to see why they may not be equally as well certified upon the original instrument as upon the copy. In *Sylvester v. Coe Q. M. Co.*, 80 Cal. 510 (22 Pac. 217), it was held that the mere endorsement upon a lien notice was *prima facie* evidence of the filing and date of recording. *Jewett v. Darlington*, 1 Wash. T. 601, held the contrary. But here we have a formal certificate under the hand and seal of the officer, and if the fact of record can be proven by the certificate in one case, there is no good reason why it cannot be in another. It is the seal which makes the verity.

7. Each of the lienors produced a time check containing a statement of his account with the Washington Improvement Company, delivered to him by that company, and appellant objects to their competency as against it, on the ground that the admission thereby made was hearsay. These checks were good as *prima facie* evidence of the amount due, as against the company which made them, and for the purpose of foreclosing a lien they must be taken to the same extent against the appellant.

8. Each plaintiff demanded that a reasonable attorney's fee be allowed him, but alleged no particular sum to be reasonable. Proof was taken by the testimony of attorneys as to what would be a proper fee in each case, and the court allowed twenty dollars. Under the circumstances we do not think the allowance excessive.

9. The decree of foreclosure was framed so as not to respond to the pleadings, proofs or findings. Each lienor showed, and the findings adjudged, that he had assisted in producing certain logs, of which the marks and quantity in feet were given. But the decree did not set out the logs upon which the several recoveries could be had, but merely made reference to the logs described in the lien notices. Under such a direction the officer could not proceed with

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any degree of intelligence to perform his duty. This would be especially the case when, as here, the writ was to be directed to the sheriff of a county other than that in which the decree was entered.

10. While the conclusions of the court below as to the foreclosure are sustained, when proof shall have been made of the county where the logs were cut, we cannot uphold the judgment rendered against the appellant. The law under which these liens were filed gave a right of action to one holding a logger's lien against a third person who should injure, impair, destroy or render difficult, uncertain or impossible of identification the logs to which the lien pertained, for his damages to the amount secured by the lien. Gen. Stat., § 1694. But that right was maintainable only in an action separate from the foreclosure suit.

The court below, however, apparently adopted the view that, as the act of 1893 changed the mode of procedure so that these damages could be recovered in the foreclosure action (Laws, p. 434, § 20), it was proper, upon proof of the damage, to include it in the decree as an alternative judgment, in case the logs were not forthcoming. This construction might be proper were the circumstances different, viz., if there were a case of injury, destruction or difficulty of identification. But the new law introduces a new ground of damage, viz., "eloignment," and it was to the charge of eloignment alone that there was any testimony in the case against appellant. To "eloign" is to take away beyond the jurisdiction, or to conceal, so that under the new law it is possible that the construction would be that the mere removal of logs under lien from the county would cause the right of action for damages to accrue, since the apparent contemplation of § 12 (Laws 1893, p. 432) is that the sheriff of the county where the foreclosure suit is brought shall take possession for the lienors. But under the proofs adduced, whatever was done

by appellant with these logs was done before the new law even passed, and when only injury, destruction or rendering difficult of identification would make it liable in damages. Of course eloignement, in the sense of concealing, would have satisfied the old law; but here the proof went no further than to show that some logs were towed away from Shelton under consignment to appellant, and that some logs were seen in appellant's boom at Port Blakely, in December, 1892; so that the eloignement, if any, occurred when there was no statute making that alone a ground of action. It is needless to say that the new statute could not create a cause of action based on an eloignement occurring before its passage.

Still other valid objections to the decree against appellant were that the complaint stated no facts showing any interference with the logs by appellant, all the proofs against it having been admitted over objection on that ground, and without any offer to amend. Again, there was no proof of the value of the logs. Although the statute gave to each lienor a right of action for his damages, the total damage against one who should defeat the lien by removing, concealing or destroying the logs, could not, in any case, exceed the value of the logs liened; for it would only be to the extent of the value that damage could accrue.

The decree will be reversed, and the cause remanded with directions to the court below to receive proof that the logs were cut in Mason county, and thereupon enter a new decree of foreclosure against such logs as may still be found, whether in Mason county or not.

DUNBAR, C. J., and HOYT, SCOTT and ANDERS, JJ., concur.

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[No. 1250. Decided March 23, 1894.]

THE BANK OF COMMERCE OF CENTRALIA, WASHINGTON,
Appellant, v. C. A. WARREN, *Respondent*.

VACATION OF JUDGMENT—ABUSE OF DISCRETION.

Where judgment of default has been entered against a plaintiff for failure to appear at the trial of the cause on the day set therefor, it is an abuse of discretion for the court to refuse to vacate the judgment, when the plaintiff comes into court within twenty minutes after the opening of court, which was called at the early hour of 8:30 A. M., and moves to vacate the judgment, and the defendant in open court consents thereto.

Appeal from Superior Court, Lewis County.

Frank C. Landrum, and *Edward F. Hunter*, for appellant.

George E. Rhodes, and *A. E. Rice*, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—On the 27th day of April, 1893, the appellant was the alleged owner of 250,000 shingles. The respondents on said day took said property from the possession of appellant, demand for return was made, refused, and an action was brought for the return of the property and judgment for the value thereof and for costs of said action, and a writ of replevin was sued out, under which writ the sheriff seized the property. An answer was filed May 19, 1893, and the case was set down for hearing by the superior court of Lewis county for June 30, 1893. There were other cases before this one on the docket set for the same day. No order was fixed for the trial. The court convened at 8:30 A. M. The other cases were disposed of, the replevin case was called, defendants' counsel being present but the plaintiff's counsel being absent. Counsel for defendants moved for a non-suit, which was

granted by the court; whereupon, after a non-suit, without motion therefor, the court proceeded to render judgment against the plaintiff for a return of the property, or on failure, then for \$500 damages and costs.

Twenty minutes after the court convened, or at ten minutes before 9 o'clock A. M., of the same day, plaintiff's counsel appeared in court and moved to vacate the non-suit and judgment and reinstate the case on the docket. The counsel for defendants, in open court, consented thereto. But the court refused so to do. This application was made before the judgment was entered. This action is to set aside said judgment rendered June 30, 1893, and reinstate the case. A demurrer was filed to the complaint and overruled by the court. An answer was filed and the case went to trial. Plaintiff moved for judgment upon the pleadings to vacate the former judgment. The court denied the motion and signed the first bill of exceptions. Plaintiff also moved to set aside the former judgment, because said judgment was in excess of the power of the court.

Appellant assigns as error: (1) That the judgment of June 30th should have been for the dismissal of plaintiff's action, and nothing further. (2) That the court had no authority under the pleadings in said original action to render a money judgment in favor of defendants and against the plaintiff. (3) That the court erred in refusing to vacate the judgment rendered on said day when the defendants consented that said judgment might be vacated.

Various other errors are assigned, but the view we take of assignment number three renders their investigation unnecessary. Nor is it necessary to discuss the question whether the court had authority under the pleadings in the original action to render a money judgment, or whether the judgment should have been limited to a judgment for non-suit. While ordinarily questions of this kind are very largely submitted to the discretion of the trial court, who

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Syllabus.

is supposed to be familiar with all the circumstances of the case, yet when it is conceded, under the circumstances of this case, that the counsel for plaintiff appeared within twenty minutes after the calling of the court at the early hour of 8:30 A. M., and it is further conceded that the counsel for defendants recognized the justice of the application of plaintiff to set aside the non-suit and proceed to the trial of the case, we think that this court is justified in coming to the conclusion that the trial court abused its discretion in refusing to vacate the order of default. When both parties to an action are willing to waive any technical omissions or slight laches, and try the case on its merits, we think the court is going too far to arbitrarily refuse to sanction such an agreement. The judgment will, therefore, be reversed, and the case remanded with instructions to grant the relief prayed for in appellant's complaint.

SCOTT, HOYT, STILES and ANDERS, JJ., concur.

[No. 1153. Decided March 27, 1894.]

JOHN RICKEY *et al.*, Respondents, v. A. T. WILLIAMS *et al.*, Appellants.

REMOVAL OF COUNTY SEAT—JURISDICTION OF COUNTY COMMISSIONERS—INJUNCTION.

The fact that the commissioners of a county have made an order, based upon a proper petition therefor, for the submission to the people of the question of removing the county seat to the town named in such petition, will not authorize them, under Gen. Stat., §§ 2458-61, to submit at the same election a proposition for its removal to a certain other town, when the petition for removal to the latter place contains the names of less than one-third of the number of people voting at the last preceding general election.

Injunction will lie at the suit of a county officer to enjoin the removal of the county seat, when the board of county commissioners

8	479
12	436
114	612
8	479
16	280

had never obtained jurisdiction by proper petition to order the submission of the question to popular vote. (DUNBAR, C. J., dissents).

Appeal from Superior Court, Stevens County.

R. B. Blake, and F. T. Post, for appellants.

Thomas C. Griffiths, for respondents.

The opinion of the court was delivered by

SCOTT, J.—On August 20, 1892, a petition was presented to the board of commissioners of Stevens county, purporting to be signed by four hundred and twelve of the electors of said county, praying for a change of the county seat from Colville to Chewelah, and asking that at the next general election the question be submitted to a vote of the people. Whereupon said board of commissioners, on said date, made an order reciting that:

“It appearing to this board that said petition is signed by names to the number of at least one-third of the total number of votes cast at the last general election held in Stevens county, it is ordered that said petition be granted, and that said proposition be submitted to the voters of said Stevens county at the next general election.”

On October 6, 1892, another petition was presented, purporting to be signed by one hundred and twenty-four of the electors of said county, asking for a removal of said county seat to Kettle Falls. Whereupon, on said date, the board made the following order:

“The petition of Arthur W. Holly and one hundred and twenty-three others for an election for the removal of the county seat from Colville to Kettle Falls read, and on motion of C. K. Simpson the prayer of the petitioners granted, and auditor ordered to have notices printed and posted.”

It appears that two of the then commissioners were in favor of this motion and one was opposed to it.

On October 7, 1892, another petition was presented pur-

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porting to be signed by fifty-one of the electors of said county, praying for a removal of the county seat to Springdale. Whereupon the board on said date made the following order:

“Petition of Mark P. Shaffer and fifty others for an election for change of county seat of Stevens county from its present location at Colville to Springdale, Stevens county, granted.”

It appears that a vote was taken upon these propositions at the general election held on November 8, 1892, and that 599 votes were cast in favor of Kettle Falls; and that thereafter, on November 15, 1892, said board of county commissioners declared that said town of Kettle Falls had received the requisite number of votes to constitute it the choice of the electors of said Stevens county as its county seat, and ordered that notices of the result be posted as required by law.

The respondents brought this suit to enjoin the removal of said county seat from Colville to said town of Kettle Falls. They allege that they are taxpayers of said county; that respondent Rickey is county treasurer, and that appellants Williams, Weston and Simpson constituted the board of commissioners, and that the other appellants are the county officers of said county. After the induction of the newly elected county officers into office, in January, 1893, respondents filed an amended complaint, and sought to make the new officers parties defendant to the action. The court allowed the filing of the amended complaint, but denied the motion to make new parties. The complaint further sets up the filing of the petitions aforesaid, the election thereon, the decision of the commissioners, and that they were threatening to remove the county seat pursuant to such decision; and further alleged that the petition praying for a removal of the county seat to Kettle Falls was not signed by one-third of the qualified electors of said

county, and that the board did not pass upon the sufficiency of the Kettle Falls petition. The complaint also contains further allegations to the effect that great expense would be entailed upon said county in case such removal was made. These allegations were denied by the answer, and a trial was had and judgment rendered in favor of the plaintiffs, enjoining the removal of the county seat from the town of Colville, and from said judgment this appeal is prosecuted.

We find it unnecessary to discuss many of the questions raised by counsel, respectively. The respondents contend that said election was void, and that the board of commissioners had no jurisdiction to submit the question of the removal of such county seat from Colville to Kettle Falls in consequence of the fact that the petition therefor had not been signed by the requisite number of qualified electors of said county. Appellants dispute this, but first contend that the lower court had no jurisdiction over the subject matter of the action; that the matter of establishing and removing county seats is not a judicial function, but is purely legislative in character.

We will first discuss the proposition as to the validity of the election. It was admitted upon the trial that at the general election held on November 4, 1890, which was the last preceding general election to the one in question, there were cast in Stevens county 1,033 votes. Consequently, it appears beyond controversy that there was not the requisite number of signers upon the face of the petition asking for a removal of the county seat from Colville to Kettle Falls. But appellants contend that, under the law relating to the removal of county seats, the petition first presented, which was signed by the required number of electors, was sufficient to give the board jurisdiction to submit the matter of moving such county seat to Kettle Falls as well as to Chewelah. The statutes in question are §§ 2458-2461, Gen. Stat., which are as follows:

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“SEC. 2458. Whenever the inhabitants of any county of this state desire to remove the county seat of the county from the place where it is fixed by law or otherwise, they shall present a petition to the board of county commissioners of their county praying such removal, and that an election be held to determine to what place such removal must be made: *Provided*, That the petition for removal shall set forth the names of the towns or cities to which such county seat is proposed to be removed.

“SEC. 2459. If the petition is signed by qualified electors of the county equal in number to at least one-third of all the votes cast in the county at the last preceding general election, the board must, at the next general election of county officers, submit the question of removal to the electors of the county.

“SEC. 2460. Notice of such election, clearly stating the object, shall be given, and the election must be held and conducted, and the returns made, in all respects, in the manner prescribed by law in regard to elections for county officers.

“SEC. 2461. In voting on the question, each elector must vote for or against the place named in the petition, plainly designating same on his ballot.”

And it is argued that as § 2458 provides that the petition for removal shall set forth the names of the towns or cities to which such county seat is proposed to be removed, the intention was not to limit it to any one place. Said first petition, however, only prayed for the submission of the question of the removal of the county seat from Colville to Chewelah, and we are of the opinion that the contention of the appellants in this respect cannot be sustained, although the language of the particular statute would seem to warrant it. It would have more force undoubtedly if the petition had asked for the removal of such county seat from Colville to one or more places, either designating them, or for a removal generally, according to the choice of the people in the election to be had.

It will be noticed, however, that § 2461 provides that in

voting on the question each elector must vote for or against the place named in the petition, and this first petition only having prayed for a submission of the one question, that is, for a removal of the county seat from Colville to Chewelah, that was the only question that the board was authorized to submit at the ensuing election; and the voting thereon under the statute in question had to be confined to the place named. It follows from the admitted facts in this case that the board had no jurisdiction to submit the question of the removal of such county seat to any other place than the town of Chewelah.

It is contended by appellants, however, that the board found that the petition asking for the submission of the question of the removal from Colville to Kettle Falls had been sufficiently signed. It is not contended that the board directly found this, but it is claimed that it must be held that they did find it in consequence of their having submitted the question; and that as the board passed upon this question, its determination thereof was conclusive and cannot be questioned in a judicial proceeding. It is claimed that the action of the board in the premises was in effect but one action upon all three petitions, and that the question should be considered as if all three petitions had prayed for a removal of the county seat to the respective places named. But this contention is not sustained. The board acted upon the first petition before the others were presented, and their action upon the subsequent petitions was an entirely independent matter, and was so necessarily.

Board v. Markle, 46 Ind. 96, is cited as sustaining the proposition that the finding of the commissioners upon the sufficiency of the petition cannot be called in question. That case is the most nearly in point of the cases cited by appellant; but it is not strictly applicable, for it only appeared in that case that the petition had been signed by two persons and others, the number not being stated;

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while in this case it affirmatively appears from the admitted and uncontroverted facts that the petition asking for a removal to Kettle Falls was not signed by the requisite number of electors.

There are certain questions, probably, upon which the finding of the commissioners would be held conclusive, as, for instance, in determining the qualifications of the signers, as to whether they were qualified electors of the county. But no such question is presented here, nor are we called upon to review the action of the board as to any question upon which they could have found under the admitted facts in the premises; nor to determine whether the action of the board in such matters is judicial in its nature or otherwise.

In either event, the action of the board in submitting the question of the removal of the county seat from Colville to Kettle Falls was absolutely unauthorized, and the election held in pursuance thereof was necessarily invalid for that reason, and the question is presented as to whether, under such a state of facts, an injunction will lie to prevent a threatened removal of the county seat in pursuance of such void election.

It is contended first by appellants that such an action will not lie at the suit of a taxpayer, as the question of the removal of a county seat is a political question, in which no person has any property right, and many authorities are presented in relation thereto. A number of states have held that a suit to enjoin the removal of a county seat will not lie at the instance of a taxpayer. In *Attorney General v. Supervisors*, 33 Mich. 289, it is held that the removal of a county seat is a purely political question, and does not in any way legally involve the rights of private parties. There was no question of increased expenses or the expenditure of public moneys involved in

that case. Other cases have been cited to the same effect, but we deem it unnecessary to discuss them.

Considered in the abstract, it must be admitted that such question is a political question, but when it appears that such changed location involves the expenditure of a large sum of public money, which would otherwise be unnecessary, no good reason is apparent why the removal thereof may not be enjoined, in case the election was void. Numerous instances have been presented where the right of a taxpayer to enjoin the illegal expenditure of public moneys and the unlawful levying of a tax has been sustained, and there is no good reason why such a suit will not lie in all such cases, regardless of the use to which the money is to be devoted, and although the validity of an election to determine the relocation of a county seat is involved. The result to the taxpayer is practically the same in all cases.

An entirely different case is presented here from that of *Parmeter v. Bourne*, ante, p. 45, lately decided by this court. There was no question in that case of the jurisdiction of the board to call the election; but the questions raised related to matters upon which the board of commissioners or the election boards had passed, or had presumptively passed, after having obtained jurisdiction in the premises.

We find it unnecessary, however, to determine in this case as to whether such an action will lie at the instance of a taxpayer only, for the plaintiff Rickey was county treasurer, and the law compelled him to hold his office at the county seat. We are of the opinion that in any event he was a proper party plaintiff, and no question of misjoinder has been raised in the case. Rickey had a special interest in the matter, and the complaint states a cause of action. The defendants were about to compel him to remove his office as treasurer to another place than the county seat,

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and it was not only his right but his duty to prevent such action.

Of the authorities presented by the respective parties we cite the following as sustaining the conclusions we have reached: *Caruthers v. Harnett*, 67 Tex. 127 (2 S. W. 523); *Fox v. Board of Supervisors*, 49 Cal. 563; *Laros v. Vincent*, 16 Neb. 208 (20 N. W. 213); *Boren v. Smith*, 47 Ill. 482; *Hays v. Jones*, 27 Ohio St. 218; *State v. Eggleston*, 34 Kan. 714 (10 Pac. 3); *Hord v. Elliott*, 33 Ind. 220; *Doan v. Board of Commissioners*, 2 Idaho, 781 (26 Pac. 167); *Todd v. Rustad*, 43 Minn. 500 (46 N. W. 73); *Lane v. Schomp*, 20 N. J. Eq. 82; *State v. Nemaha Co.*, 10 Neb. 32 (4 N. W. 373); *Ayres v. Moan*, 34 Neb. 210 (51 N. W. 830); *La Londe v. Board of Supervisors*, 80 Wis. 380 (49 N. W. 960).

The granting of the writ in this case did not involve an inquiry into any matter which rested in the discretion of the board, nor into any disputed question of fact. It was not an interference with the legislative branch of the government in any sense, but rather was in aid of legislative action. The legislature only authorized the board to submit the question in case the petition specified was filed, and then the board *must* submit it. If the board should arbitrarily refuse to act where under the undisputed facts the law required them to proceed, the courts would unquestionably compel them to act. No other branch of the government could compel action, and if the courts have not jurisdiction in such a case the legislature is powerless and the law simply a dead letter.

Affirmed.

HOYT, STILES and ANDERS, JJ., concur.

DUNBAR, C. J. (*dissenting*).—I dissent. I think this case falls within the logic of the opinion rendered by this court in *Parmeter v. Bourne*, *ante*, p. 45. There is no question

involved in this case of the power of the courts to compel the board to act, for the board *did* act, and the question is, can the court review that action? When the board has exercised its discretion, its judgment, in my opinion, is conclusive.

[No. 1172. Decided March 27, 1894.]

THE STATE OF WASHINGTON, *on the relation of M. S. Bittencouer et al., Respondents*, v. T. W. GORDON, *Clerk of the Superior Court, Appellant*.

COSTS—FEES OF COUNTY CLERK—FILING TRANSCRIPT OF JUDGMENT OF JUSTICE OF PEACE.

The provision of Laws 1893, p. 425, requiring the party instituting any action or proceeding to pay a fee of four dollars when the cause is entered in the court, or when the first paper on his part is filed therein, has no application to the filing and entry of a transcript of a judgment of a justice of the peace in the execution docket of the county clerk.

Appeal from Superior Court, King County.

John F. Miller, and *A. G. McBride*, for appellant.

Ralph Simon, for respondents.

The opinion of the court was delivered by

ANDERS, J.—On July 1, 1893, the respondents, as partners, under the firm name of the Queen City Provision Company, recovered a judgment against one C. B. Walsworth, before a justice of the peace in and for King county. For the purpose of causing the said judgment to become a lien on the real estate of the defendant, the respondents tendered a duly certified transcript thereof, together with ten cents for filing the same, and fifteen cents for each folio therein contained, to the appellant, and requested him,

as county clerk and *ex officio* clerk of the superior court of King county, to file and enter said transcript in his execution docket. The clerk demanded a fee of four dollars, which sum the respondent refused to pay, whereupon he declined to file the transcript. To compel the clerk to comply with their request the respondents instituted this proceeding.

The appellant contends that the amount demanded by him was the fee fixed by statute for the services required, and he bases his contention upon the provisions of § 2 of the fee act, approved March 15, 1893, the material portion of which, so far as the question now under consideration is concerned, is as follows:

“The plaintiff or other party instituting any such action or proceeding shall pay, when the cause is entered in the court, or when the first paper on his part is filed therein, a fee of four dollars (\$4.00).” Laws 1893, p. 425.

Now, it seems plain that the fee prescribed in this section of the statute can only be exacted from a party who institutes in the superior court an *action* or *proceeding*. That the filing of a transcript of a judgment of a justice of the peace, by the county clerk, is not the commencement of an action, can hardly be controverted. Is it, in legal contemplation, a proceeding? The appellant claims that it is, because such filing enables the plaintiff to execute his judgment.

But, in our opinion, his position is entirely untenable. Generally a proceeding, in contemplation of law, means any application, however made, to a court of justice for the purpose of having a matter in dispute judicially determined. The mere doing of a ministerial act by a non-judicial officer is not such a proceeding as is provided for in the section of the statute relied on by the appellant. This, we think, is evident from the language there used, irrespective of any other consideration. The fee there

mentioned is payable when the *cause* is entered in the court, etc., and a *cause* is defined to be an action at law, a suit at law or in equity, a judicial proceeding. Anderson, Law Dict., tit. "Cause," subd. 3. While our legislature has not, in specific terms, defined the meaning of the word proceeding, it has done so inferentially in many cases. For example, an application for a writ of mandate is denominated a proceeding (see Code Proc., §745), and so is an application for a writ of *ne exeat* (*Id.*, §754).

Whenever a controversy is determined summarily, without the intervention of a jury, the method of disposing of it may be designated as a proceeding, in contradistinction to an ordinary trial which proceeds according to the course of the common law.

The judgment of the lower court is affirmed.

DUNBAR, C. J., and SCOTT and STILES, JJ., concur.

HORT, J., dissents.

[No. 1205. Decided March 27, 1894.]

WEST COAST IMPROVEMENT COMPANY, *Respondent*, v.
THOMAS WINSOR *et al.*, *Appellants*.

INJUNCTION—TRESPASSERS ON TIDE LANDS—RIGHTS OF UPLAND PROPRIETOR—APPEAL—WEIGHT OF TESTIMONY.

Where there is a substantial conflict over the facts upon which a temporary injunction has been granted, the supreme court will not, on an appeal from such order, disturb the action of the trial court.

An upland owner has, under the laws of this state, a preference right of purchasing the tide lands lying in front of his lands where such lands have not been occupied and improved by others prior to March 26, 1890, and, by reason thereof, is entitled to an injunction against mere trespassers who are attempting to occupy or interfere in any way with his possession of such tide lands. (*Pierce v. Kennedy*, 2 Wash. 324, and *Morse v. O'Connell*, 7 Wash. 117, distinguished.)

Appeal from Superior Court, King County.

Winsor, Bush & Morris, for appellants.

Preston, Albertson & Donworth, for respondent.

The opinion of the court was delivered by

HOTT, J.—Respondent brought an action to restrain the appellants from driving piles upon a certain part of the tide lands in front of the city of Ballard. The complaint alleges, among other things, that respondent was the owner of the upland in front of which such portion of the tide land was situated. The appellants, in their answer, denied such ownership, and set up the fact that they were in possession, with such improvements as were contemplated by the tide land act of 1890 (Laws, p. 431), at the date of its passage; and, as such improvers, were entitled to the prior right of purchase under the provisions of said act. The questions of fact, as to which a large number of affidavits were introduced, were confined substantially to those growing out of the allegations and denials as to these two propositions. The superior court, after an examination of the proofs offered by the respective parties, granted a temporary injunction, as prayed for by the respondent, and from the order granting it this appeal has been prosecuted.

Appellants, in their brief, rely upon the facts in relation to the questions submitted to the lower court, and further claim that even if the facts were correctly decided, the law would not warrant the interference of the court by its writ of injunction. As to such questions of fact there was such a substantial conflict that upon an appeal from an order of this kind this court ought not to disturb the finding of the lower court. The order made is but a tentative one, and the bond required of the respondent will protect appellants, if, at the end of the litigation, it is found that the

temporary injunction should not have been granted; while if we should go into an examination of the facts and determine them differently, and upon such determination set aside the action of the lower court, and upon final hearing upon proofs taken under circumstances which would better enable the courts to arrive at the truth of the matter, it should be found that this court had made a mistake as to the facts, the injury to the respondent might be beyond repair. In view of these considerations, the appellate court should upon appeals from preliminary orders of this kind refuse to disturb the facts upon which the trial court proceeded, if the proofs are such that they may be said to have fairly warranted such a determination, even although, upon a final consideration, this court would feel obliged to find differently upon the same proofs. It follows, that in the determination of this appeal we shall assume that the court below properly found that the respondent was the upland owner and that the locality in question had not been so occupied by the appellants as to entitle them to the first right of purchase under said tide land act.

Upon this state of facts the court below was of the opinion that the law warranted its interposition to prevent the appellants from making improvements contrary to the will of the respondent; and whether or not it was right in so interpreting the law is the sole question presented for our consideration.

We held in the case of *Eisenbach v. Hatfield*, 2 Wash. 236 (26 Pac. 539), that the upland proprietor, as such, had no rights as to tide lands in front of him which the state was bound to respect. There is a suggestion in the brief of the respondent that decisions of the court of appeals in the State of New York, and of the supreme court of the United States, subsequent to our decision of that case, have been such that we ought again to enter upon an investigation of the questions there decided. But in view of the

fact that this court has recognized the doctrine announced in that case in several other cases; of the further fact that we are not satisfied that the cases cited by respondent have announced a contrary doctrine, excepting as the conditions have been influenced by statute law, and of the recent decision of the supreme court of the United States in the case of *Shively v. Bowlby*,¹ on appeal from the supreme court of the State of Oregon, which has not yet been published, and as to the terms of which we are not advised further than from reports in newspapers, which, however, seem to indicate that the principles announced in the case of *Eisenbach v. Hatfield* have been fully sustained by the court of last resort as to such questions, we shall not at this time enter into any further investigation thereof, but shall assume that the law applicable to tide lands of this state was correctly interpreted in said case.

That case, however, did not go to the extent of holding that an upland proprietor had no interest in the tide land in front of him, except as against the state, and the question as to what would be his rights as against one not claiming under the state has not been passed upon, so far as we are advised, by this court. Nor is it necessary that we should pass upon it in determining this appeal, as, in our opinion, the state, by the enactment of the tide land law above referred to, has conferred upon upland proprietors a valuable right which they hold to the exclusion of all others excepting such improvers as under the terms of said act have superior rights; and, as we have seen, from what we have said about the facts of this case, that for the purposes of the decision of this appeal the appellants are not in a situation to assert such rights under said act, there is nothing which prevents full force being given to the rights of the respondent as the upland owner. The respondent, then, under the provisions of the laws of the

¹ Reported in 14 Sup. Ct. 548.

state in reference to tide lands, has the absolute right to purchase the location in question, with which right the state alone has authority to interfere.

Such being the situation and rights of the respondent, we think that a fair interpretation of the statute will show that it was the intent of the law making power that no mere trespasser upon the tide lands of the state should be allowed to occupy or in any manner interfere with the possession by the upland owner of the tide lands in his front, until such time as he could exercise his right to purchase the same from the state. The appellants, then, had no right whatever to do the acts complained of, and the respondent had a right to enjoy the possession of the location in question until such time as it would be allowed to purchase under the laws of the state. It follows that the action of the appellants was in contravention of the rights of the respondent.

This being so, it would follow, under the general maxim, that it must be entitled to some protection under the law. This court held in the case of *Pierce v. Kennedy*, 2 Wash. 324 (26 Pac. 554), that such upland proprietor had no remedy at law. Hence, if it has any remedy at all it must be in equity. We are not prepared to hold that in such a case as this the exception to the general rule must be held to obtain, and that by reason of such exception the respondent, though having an undoubted right, must submit to its violation by a stranger, for the reason that the courts are powerless to afford it protection. It is no doubt true, as contended by appellants, that the question of who shall have the right to purchase, and other matters of that kind, before they can be finally determined, should be acted upon by the board authorized by the legislature, and that as to the final rights of the parties to controversies of this kind the courts will have no jurisdiction until action has been had by said board. But it does not follow that

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during the time intervening between the granting of the right by the legislature and the doing of such acts under said law as will give such board jurisdiction to determine as to the rights of the parties, the courts have no jurisdiction to protect the enjoyment of the situation which the legislature fairly contemplated should be maintained until such time as such board should have taken action.

There being no person who could acquire any right as against the respondent to occupy the location until after the action of such board, it must follow that it is entitled to protection in its right of possession. It would not be questioned but that an improver is entitled to protection of his possession until such time as he has opportunity to purchase under the law; yet the rights given to him by the act are no more positive than are those conferred upon upland proprietors, and if he is to be protected in his possession so that his right to purchase may in no manner be interfered with, the upland proprietor should be entitled to like protection. While the question might not have been directly involved in the case of *Eisenbach v. Hatfield*, *supra*, that was said by this court in its opinion which clearly tended to show that the improver would be entitled to protection as to his possession; and for that reason we think it must be held that the upland proprietor should have a like protection.

It is contended on the part of the appellants that in the case of *Morse v. O'Connell*, 7 Wash. 117 (34 Pac. 426), this court decided that it could not interfere in favor of one claiming the right to purchase as against one trespassing upon the location as to which said right was claimed. But an examination of the facts of that case will show that what was said by the court in regard to that question cannot fairly be so interpreted. In the first place, the question of law presented there was different from the one presented here. In that case the improver did not claim

that his improvements actually covered the location, and for that reason the question as to whether or not he had any rights thereto would be dependent upon the finding by the properly constituted board as to whether or not it was necessary to the enjoyment of his improvements. And for this reason the question of fact, the determination of which was primarily devolved upon such board, had to be determined in order to ascertain whether or not he had any right to the location. While in the case of an upland proprietor the right is given regardless of the determination of any question of fact, subject only to an exception which must be made affirmatively to appear before it can have any influence upon the rights of the upland owner.

If the courts should hold that the upland owner had no right to prevent one having no claim whatever from squatting upon tide lands in his front, we should have such a state of facts existing as would tend greatly to the prejudice of the public interests. The delays of the law are such that it may be years before it will be finally determined as to the right to acquire ownership under the state, and if, during all that time, the possession of such tide lands is to be the subject of an uncontrolled scramble between those claiming no right whatever thereto, a most objectionable state of affairs will be inaugurated. In our opinion, the courts are not obliged to sit idly by and allow the unrestrained cupidity and passions of trespassers, in which might will be the all powerful factor, to have full play. The courts, by retaining matters *in statu quo*, will in no manner interfere with the rightful jurisdiction on the part of the proper authorities as to the possession and ownership of the tide lands of the state.

The order granting the temporary injunction must be affirmed.

DUNBAR, C. J., and STILES, SCOTT and ANDERS, JJ., concur.

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[No. 1267. Decided March 27, 1894.]

THE UNION SAVINGS BANK AND TRUST COMPANY, *Appellant*, v. GEORGE GELBACH, *Treasurer, Respondent*.

COUNTY WARRANTS—INTEREST—EFFECT OF LAW CHANGING RATE.

Under the laws of this state a county warrant is a contract to pay money, and, if not paid on presentment to the county treasurer, the legal rate of interest in effect at such time enters into the contract as a part thereof, and cannot be affected by a subsequent law reducing the rate. (HOYT and ANDERS, JJ., dissent.)

Appeal from Superior Court, Thurston County.

Crowley, Sullivan & Grosscup, and A. E. Buell, for appellant.

Milo A. Root, for respondent.

The opinion of the court was delivered by

STILES, J.—Appellant being possessed of warrants issued by Thurston county in 1891–2, upon the call of respondent, who is treasurer of the county, presented them to him for payment. The treasurer offered payment of the principal with interest at ten per cent. per annum until June 7, 1893, and at eight per cent. since that date. The reason for the difference in the rate of interest offered was that, whereas, prior to June 7, 1893, the legal rate of interest in this state was ten per cent., the act of February 21, 1893 (Laws, p. 29), which took effect June 7th, reduced that rate to eight per cent.

The statute, Gen. Stat., §216, requires the treasurer, when he has not funds to pay a county order or warrant presented, to indorse it “Not paid for want of funds,” with the date of the indorsement over his signature; and from this time it is declared the order shall draw *legal* interest.

8	497
9	401
36*	467
37*	306
8	497
12	368
14	386
8	497
11	438
11	566
36*	467
39*	649
40*	132
8	497
15	135
17	949
8	497
f20	590
8	497
f22	475
f22	549

The contention of the appellant is—(1) That the language and intention of the act of 1893 are wholly prospective; (2) whatever may have been the intention, it was not within the power of the legislature to change the rate which prevailed at the time when the orders were presented and indorsed.

In *Saunders v. Carroll*, 12 La. An. 793, the first of the above points was well covered, and it was held that a new interest law would not be considered as applicable to cases which arose previous to its passage unless the legislature, in express terms, declared such to be its intention. We have no idea that our legislature of 1893 contemplated, for one moment, that public obligations of this class would be repudiated to the extent of one-fifth of the interest thereon, by the passage of the act of February 21st. The act itself bears no evidence of any such intention. But a disposition of the case upon this point would be far from satisfactory, and we shall consider it upon the other, as well. It is agreed that if the provision in regard to interest at the rate of ten per cent. entered into and became a part of the contract, the legislature could not impair it by making the reduced rate applicable to the warrant, either before or after the passage of the law; but if the exaction of interest is mere penalty for the unlawful act of detaining money due, then it is conceded that it is changeable with the change in the law.

A county order or warrant is lacking in one of the qualities which make notes, bills, checks, etc., commercial paper, viz., "negotiability." This lack, however, is due entirely to the fact that it is open to all defenses which might have been made to the claim on which it was founded. In *Allison v. Juniata County*, 50 Pa. St. 351, it was held, following *Dyer v. Corington Township*, 7 Harris, 200, that such warrants were not even contracts upon which a suit could be maintained, but that the original indebtedness was

the sole ground of action. There are some other cases of like tenor, perhaps, but they do not express the current law of such matters. Dillon, Mun. Corp. (4th ed.), §§ 485-7, and Daniel, Neg. Inst., §§ 427-30, treat these warrants as only something less in negotiability than notes or bonds, and therefore not commercial paper. This court, in *Seymour v. Spokane*, 6 Wash. 362 (33 Pac. 832), maintained a doctrine exactly the contrary of that put forth in Pennsylvania and a few other states concerning the payment of interest on warrants where no statute required it.

But however the case may be elsewhere, or in other cases, we are satisfied that it cannot be held here that a county warrant is not a contract to pay money. Our statutes governing the presentation and allowance of claims against counties, and the issuance of warrants for the sums allowed, plainly contemplate that the transaction between the claimant and the county is to be merged in the warrant, and settled by it, just as fully as is a store account between a merchant and his customer when the latter gives his note for the balance found due upon the former's books. One of the principal reasons we find given in the cases alluded to for not allowing interest on warrants, where there has been no custom and no statute, is that people who have dealt with a county have, by advancing the price of their goods, discounted the face of their claims before their warrants are issued; but here we have the law making the payment of interest mandatory, so that one who deals with a county knows that he is expected to sell to it on a cash basis the same as he does to a private individual, making himself whole for delay in payment out of the interest required to be paid him. When the dealer delivers goods to the county it is just as much implied that he shall have interest at the legal rate from the time his warrant is presented, as that he shall have his claim passed upon and a warrant issued for the amount found due. But it is said

that the right to interest exists only because it is given by statute as a penalty for the county's non-payment on demand, to which the sufficient answer is, that every right which a creditor has against a county is to precisely the same extent statutory. The right to sue, the right to have a claim allowed, the right to have a warrant, and to have it paid, all depend on statutes which are none the less necessary to the existence of any of these rights because they are universal accompaniments of county organization. The obligation to pay interest is no less one of contract when the claim for interest is based upon a transaction growing out of contract, because the general burden of paying interest is imposed upon the county by a statute. Its obligation to pay the principal has the same foundation.

The only question which remains, then, is, whether, since the warrant has read into it a contract to pay "legal interest," it can be held that the rate is to vary as the legal rate is changed by statute from higher to lower, and *vice versa*. It is claimed that there is notice in the statute itself that the rate which is legal at one time may be changed later, and that the warrant holder takes the risk of the change. To support this proposition a number of cases are cited which hold the rule to be that where a note provides for "interest" from date until maturity, the rate recoverable after maturity may be changed. These cases are based upon the principle that the interest before the maturity is based upon the contract, while that after is dependent upon the rules as to damages. But no case is produced which holds, nor is it claimed by respondent, that where a note provides for "interest," or "legal interest" until maturity, any change in the interest law has been held to apply so as to raise or lower the rate recoverable up to maturity; that is, the universal holding is that where the right to interest is based on the contract it is the legal rate *at the date*

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of the contract which must prevail and cannot be altered. *Koshkonong v. Burton*, 104 U. S. 668.

Now a warrant, under our statutes, is a promise to pay it in its order of issue, when money applicable to it comes into the treasury, and its maturity, by analogy with a note, is the time when the treasurer gives notice of his readiness to pay it, and stops the interest. Respondent says that if a warrant is considered as a contract it is one which becomes due instantly upon presentation, and therefore the interest upon it, like that upon a past due note, is only allowed as damages. But there is this difference: A note can be sued upon, judgment taken, execution issued, and property levied upon and sold and the debt paid; but no action lies either upon a warrant or the original debt. In the case of the note, interest after maturity or judgment is the penalty inflicted for the wrongful failure to pay; but with the warrant the forbearance enforced by the condition of the public treasury is the reason at bottom of the allowance of interest. It is the private debtor's fault that he does not pay, but it is not the fault of the county, which must exist, but cannot pay faster than it receives the means to pay with. It is also said that the law allows interest at different rates, from time to time, according as the value of money is supposed to vary, and purely as compensation for the detention of money. Such is the theory of it when it is allowed as a penalty, but as we have seen this theory has no application when the payment of interest is based upon a contract, although that contract merely provides for the legal rate. Respondent is forced to admit that if, instead of passing a new law merely lowering the legal rate, the legislature had simply repealed § 2795 of the General Statutes, upon his theory, all interest on county warrants would have stopped June 7th; or if the rate had been doubled, interest on such warrants after that date at twenty per cent. would have

been recoverable. Such a conclusion would, alone, be sufficient to stamp such a theory as wholly unreasonable. Public policy can justly have but little to do with such matters, but the importance of maintaining the public credit is not to be estimated at nothing. Repudiation of public obligations is not to be thought of in these days, and cannot be tolerated in the guise of reduced interest on past transactions any more than would a clipping of the principal. Nor, as has been said before, do we believe the legislature had any such intention in enacting the new law. Other statutes make ample provision by which the counties can at any time fund their legal indebtedness at as low rates as money can be procured for, thereby paying off, at a stroke, all their high interest bearing warrants and placing themselves on a cash foundation. In the meantime they ought to, and under the law can, do no less than meet their obligations upon the same terms as a private person. Having contracted to pay interest on their warrants at ten per cent., that rate is due to the holder.

Judgment reversed, and remanded with directions to set aside the order of dismissal and proceed with the cause.

DUNBAR, C. J., and SCOTT, J., concur.

HOYT, J. (*dissenting*).—I am unable to agree with the conclusions of the majority announced in the foregoing opinion. Under well settled rules of law, money due and unpaid, if the amount thereof is liquidated, will draw interest at the legal rate. It is equally well settled that an exception to such rule exists in favor of the sovereignty and of its necessary agencies in the government; that under such exception sums due and unpaid will not draw interest unless there is express statutory provision therefor, or such universal custom and acquiescence therein as to have the force of express legislation. It is conceded that counties are necessary agencies of the state, and are entitled to the

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benefits of this exception. It must follow that the warrants in question, being claims against a county, will only draw interest by virtue of the express provision of the law which provides that, after they have been presented and payment refused for want of funds, they shall draw interest at the legal rate. Without this provision the warrants would draw no interest, and the sole object of its enactment was to place counties upon the same basis, so far as the payment of interest on money due was concerned, as private individuals were without any legislation. If the money was due from a private individual, it would draw interest at the legal rate which was or should be established during the time that payment was delayed; and the fact that a certain rate was the legal rate at the time the money became due would not establish that as the necessary rate until payment. If the legislature should change the legal rate, the changed rate would obtain from the date the law making the change went into effect.

If a note is given bearing a certain rate of interest, and nothing is said about the rate which it shall draw after maturity, the great weight of authority is to the effect that after such maturity it will only draw interest at the legal rate unaffected by the contract rate set out in the note. In a case of this kind there would be much greater reason that the rate of interest as specified in the contract should continue to attach to the use of the money after a violation of its terms than that the rate in existence at the time a warrant was presented for payment should continue to be the rate as to the money represented by such warrant, uninfluenced by the fact that the legal rate had been changed by the legislature.

What is said in the opinion of the majority as to the right of one furnishing goods for the county growing out of the rate of interest which prevailed at the time such goods were furnished, needs no attention, for the reason

that it is not contended on the part of the appellant that the rate of interest upon the money due for such goods would be established prior to the time of the issue and presentation of the warrant.

Something is said about public policy, but in my opinion, considerations of that kind can have no influence in the determination of this question for the reason that the law seems to me clear, when the object to be accomplished by the legislation is taken into consideration. If from the language of the provision it was clear that the legal rate named therein referred exclusively to such rate at the date of the presentation of the warrant, such fact would not warrant the construction placed thereon, for the reason that the rate prescribed was not a contract rate, but was in the nature of a penalty for the non-payment of the money, like the penalty imposed for the non-payment of a judgment, which it is conceded is within the control of the legislature unaffected by the rate of interest established by law at the date of the entry of the judgment. But as I read the provision it has no particular reference to the date of the presentation of the warrant, but is simply a general provision applying to all warrants by which it is provided that during the time the money due thereon is unpaid such money shall draw interest at such rate as from time to time shall be established by law as the legal rate. The construction contended for by the appellant would, in my opinion, only be warranted if the statute was to the effect that after the presentation of the warrant it should draw interest at the legal rate at the date of its presentation. The general language used, and the statement that the warrant shall draw interest at the legal rate, when fairly interpreted, should only be held to mean that the legal rate referred to is that prevailing from time to time while the warrant remains unpaid.

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I am unable to find anything in the language used to show an intention on the part of the legislature to create a legislative contract. It only appears therefrom that the state and its counties should be put upon the same footing as individuals, and be required to pay for the use of money retained after it is due a fair compensation, and such compensation is fixed at the legal rate, which is fixed by the legislature from time to time as the value of the use of money changes. There is no reason why the legislation should be so construed as to compel the payment of more than a fair compensation for the use of the money. Such, however, is the result of the construction given by the majority. The judgment directed will require the county of Thurston to pay for the use of the money ten per cent. when the use has been by law declared to be worth only eight per cent. Stress is placed upon the fact that the retention of the money by the county being caused by the state of its treasury should put it upon a different basis than an individual whose neglect to pay is caused by want of funds. I can see no reason whatever for so discriminating against a county, which is but one of the agencies through which the state does its business.

ANDERS, J., concurs.

[No. 899. Decided March 28, 1894.]

THE STATE OF WASHINGTON, *Respondent*, v. RICHARD
REGAN, *Appellant*.

HOMICIDE — INFORMATION — FAILURE TO INDORSE STATE'S WIT-
NESSES — EVIDENCE — CONVERSATIONS — GENERAL REPUTATION —
IMPROPER ARGUMENT OF COUNSEL — EXCEPTIONS.

Where it does not appear that the defendant in a criminal prosecution was prejudiced by the fact that the names of the witnesses offered in rebuttal by the state were not indorsed upon the information, and no continuance was asked for on that ground, the error will be held harmless.

An information charged that the defendant "did feloniously, purposely and maliciously make an assault on one Edward Guthrie, and with a certain knife which he, the said defendant, then and there had and held in his hand, did then and there feloniously, purposely and maliciously strike, stab, thrust and cut at, upon and into the said Edward Guthrie, inflicting upon the said Edward Guthrie one mortal wound, of which mortal wound the said Edward Guthrie then and there died." *Held*, That the information was not bad for duplicity; that it charged acts constituting a crime; that it alleged the killing was done by means of a knife in the hands of defendant, and that a knife is *prima facie* presumed to be a deadly weapon.

Where a portion of a conversation has been drawn out in the examination of a witness, the opposing party is entitled to have the whole of it placed before the jury.

The refusal of the court to strike out improper remarks of counsel at the time of their utterance is harmless error, where the court later instructs the jury to disregard them.

No error can be founded upon improper argument of counsel where no motion is made to strike it, or the court asked to instruct the jury to disregard it.

General reputation cannot be proved by the testimony of a witness whose information is based on the story of one person.

Appeal from Superior Court, Snohomish County.

James Hamilton Lewis, and Bell & Austin (E. S. Lyons, of counsel), for appellant.

8	506
31	96
8	506
36	364
8	506
41	625
8	506
42	312

Mar. 1894.] Opinion of the Court—SCOTT, J.

L. C. Whitney, Prosecuting Attorney, and *James A. Haight*, for The State.

The opinion of the court was delivered by

SCOTT, J.—The appellant was convicted of manslaughter for the killing of one Edward Guthrie, and has appealed therefrom. The information upon which he was tried is as follows:

*In the Superior Court of the State of Washington in and
for Snohomish County.*

THE STATE OF WASHINGTON, *Plaintiff,*
v's.
RICHARD REGAN, *Defendant.*

Richard Regan is accused by J. W. Heffner, as prosecuting attorney in and for the county of Snohomish, State of Washington, by this information, of the crime of murder in the second degree, committed as follows:

The said Richard Regan, on the 8th day of November, A. D. 1892, in the county of Snohomish, State of Washington, did feloniously, purposely and maliciously make an assault on one Edward Guthrie, and with a certain knife which he, the said Richard Regan, then and there had and held in his hand, did then and there feloniously, purposely and maliciously strike, stab, thrust and cut at, upon and into the said Edward Guthrie, inflicting upon the said Edward Guthrie, in the abdomen of said Edward Guthrie, one mortal wound, of which mortal wound the said Edward Guthrie then and there died; against the peace and dignity of the State of Washington.

J. W. HEFFNER.

STATE OF WASHINGTON, }
COUNTY OF SNOHOMISH, } ss.

J. W. Heffner, being first duly sworn, deposes and says: That he is the duly elected, qualified and acting prosecuting attorney in and for said Snohomish county; that he knows the contents of the foregoing information, and that the same are true. J. W. HEFFNER.

Subscribed and sworn to before me this 23d day of
November, A. D. 1892. CHRIS. T. ROSCOE,

[L. s.] County Clerk and Clerk of Superior Court.
By W. H. KENNEDY, Deputy.

To this the defendant interposed a motion to quash, and also a demurrer. The motion to quash was on the ground that the information was improperly verified, and that the witnesses for the state were not indorsed thereon. The points raised upon the demurrer are, that the information is not specific or definite as to the crime charged, nor as to the particular circumstances constituting the alleged offense; that the information in no wise charges that an assault was ever made with a deadly weapon or with any other weapon, and does not allege that the said knife was used, or was so used by the defendant, or that the deceased was cut with a knife.

None of these points are well taken. The only object of the verification is to insure good faith in instituting the proceedings. It is no substantial part of the information, and the one before is sufficient under the previous decisions of this court.

It appears that the names of the witnesses who testified before the state rested were indorsed on the information, and it was within the discretion of the court to permit the prosecuting attorney to indorse the names of other witnesses after the trial was commenced. It does not appear that the defendant was in any wise prejudiced because the names of the witnesses who testified on rebuttal were not upon the information before the commencement of the trial. No continuance was asked for on that ground. See *State v. John Port Townsend*, 7 Wash. 462 (35 Pac. 367).

The information substantially conforms to the requirements of the statute. It states the acts constituting the offense in ordinary and concise language, so as to inform a person of common understanding with what he is charged. Nor does it charge two offenses, and the acts charged therein constitute a crime. It appears that the court had jurisdiction in the premises, and it is alleged that the kill-

Mar. 1894.] Opinion of the Court—SCOTT, J.

ing was done by means of a knife. It will be presumed, at least *prima facie*, that a knife is a deadly weapon.

¹ It is further contended that the court committed error in permitting the witness Lord to testify as follows:

“Q. Did you see the defendant? A. Yes, sir; from the window out in the street.

“Q. Where were you and what were you doing? A. I was at the bar about to take a drink. I made the remark—I asked who the gentlemen were who were looking in from the window. Guthrie was behind the bar.

“Q. What did you say, if anything, at that time? (This was objected to by the defendant as immaterial and irrelevant. The objection was overruled, and the witness answered). A. Well, I believe I made the remark—I asked who they were and if they were all right.

“Q. What did he (meaning Guthrie) say about these men being at the window, if anything? A. The remark he made, he said they would have to get away from the window.”

It is contended by the respondent that this testimony was part of the *res gestæ*, and furthermore that it was admissible because, prior thereto, counsel for the defendant, in cross examining one Wilkinson, had drawn out a portion of said conversation. Upon this last ground the testimony in question was proper, and the record bears out the contention of the respondent with respect to it. Counsel for the appellant having gone into the matter, respondent was entitled to have the whole of it before the jury, and for that reason it is unnecessary to discuss the further proposition as to whether it was a part of the *res gestæ*.

It is contended that the court erred in sustaining an objection to a question asked the witness Butler, relating to the reputation of the deceased as to violence in the community where he had lived previous to his living in Snohomish county, where the crime was committed. It appeared from the testimony that this witness had known

the deceased for four months, and that his reputation in Snohomish county, so far as he knew, was good; but that along the line of the railroad in the eastern part of the state, where the deceased had worked, certain persons who were strangers to the witness had informed him in substance that the deceased was of a quarrelsome disposition. In this connection counsel for the defendant stated to the court as follows:

“I propose to show the kind and manner of a man he was—his general reputation. I propose showing to the jury the kind of a man he was from the time he left Idaho, from the time, as I told the jury, of his forty fights, from the time he killed his man down on the Cœur d’Alene, until the time he failed to do the same thing at Sultan (referring to the matter on trial). I propose showing what his reputation was all along from the time I have mentioned to the time the witness knew him; to prove his character right through as such a man.”

Counsel for the state objected to the witness’ going outside of the community in which the deceased lived. The court sustained the objection; exception was taken and allowed. Whereupon counsel for the defendant said that he understood the court to say that he could not show what the character of the deceased was as a turbulent man beyond the limits of Snohomish county.

In this connection a further error is alleged to the effect that counsel for the prosecution said that it was the defendant instead of Guthrie who killed a man at Cœur d’Alene, which arose as follows: The court was answering the last suggestion of counsel for the defendant and was interrupted by counsel for the prosecution, who stated:

“We will allow you to open that matter up and go right into it. We will withdraw our objection, but if you want to show us he (meaning the deceased) killed a man in Cœur d’Alene, we will show you it was the defendant instead of Guthrie. You are mistaken in the man.”

Mar. 1894.] Opinion of the Court—SCOTT, J.

Counsel for defendant excepted to this statement, and moved to strike it out. The court denied the motion. Later, however, during the progress of the trial, the court instructed the jury to disregard such statement. Immediately after the withdrawal of the objection counsel for defendant renewed his question, and the witness, without further objection, apparently detailed all he knew with reference to the character of the deceased, but said nothing of his having killed a man at Cœur d'Alene or elsewhere, and was not directly asked by counsel for the defendant with regard to it. We are of the opinion that there was no error in the premises prejudicial to the defendant, and it is unnecessary to pass upon the question as to whether the defendant had a right to show what the reputation of the deceased was prior to his coming to Snohomish county.

It is further contended that the court erred in sustaining an objection to a question asked one Mrs. Speer, as to the general reputation and character of the deceased for violence and turbulence. It appeared that all this witness knew with reference to the character of the deceased was as to what one person—Guthrie's wife—had told her, and she was therefore incompetent to testify on that point, and the objection was properly sustained.

In making his closing argument to the jury, counsel for the prosecution said, purporting to recite a part of the testimony, "He, Regan, says to Hines, 'we are going to be arrested.''" It is contended that this is error, for the reason that there is no evidence of any such statement in the record. Counsel for the defendant excepted to it, but it does not appear that he moved to strike it or asked the court to instruct the jury to disregard it. Consequently there is no foundation for any error in the premises. Furthermore, it does not appear that such statement could have been prejudicial to the defendant in any manner.

The next error complained of is with reference to the

instructions given to the jury. The charge is quite lengthy and consists of thirty separate instructions. Appellant sets forth nearly all of them in his brief and criticises each one independently; and he further alleges that the court erred in refusing to give nine of the sixteen instructions requested by the defendant, which are also set forth. It appears to us that the charge of the court fairly presented the case to the jury, and that there was no error in that which was given, or in refusing to give those instructions requested by the defendant which were refused. Some of the instructions given by the court would be open to criticism when considered without reference to others which were given, but when the whole charge is considered the objections are removed.

It is further contended that the evidence was insufficient to warrant a conviction, and that this court should set aside the verdict for that reason. After a careful review of the testimony, we do not feel that we would be warranted in reversing the case upon that ground.

Affirmed.

DUNBAR, C. J., and HOYT, ANDERS and STILES, JJ., concur.

[No. 1035. . Decided March 28, 1894.]

THE STATE OF WASHINGTON, *Respondent*, v. DOMINICO
COELLA, *Appellant*.

CRIMINAL LAW—QUALIFICATION OF JUROR—EVIDENCE—CONCLUSIONS OF WITNESS—CONFESSIONS—FAILURE OF STATE TO CALL WITNESS—VIEW OF PREMISES—INSTRUCTIONS—EXCEPTIONS.

A juror in a murder trial is not disqualified by the fact that he had heard what purported to be the facts relative to the killing from several persons soon after its occurrence, when he testifies that he could disregard any impression received therefrom, and try the case fairly upon the evidence.

Mar. 1894.] Opinion of the Court — SCOTT, J.

The refusal of the court to permit an answer to a question, which merely asks for a conclusion of the witness, is not erroneous.

In a prosecution for murder, where the plea of self defense is set up, the admission in evidence of the statement of defendant that he killed the deceased is harmless error, though the confession was made as the result of fear produced by threats. when no further particulars than the mere killing are wrung from the defendant while under the influence of fear.

Proof of the reason why the state does not, in a second trial of a criminal case, call a witness who testified for the prosecution upon a former trial, is immaterial.

It is not error for the court to refuse to instruct the jury to find a verdict of not guilty in a prosecution for murder, when the state has proved the killing by defendant of deceased, the weapons used, and the condition in which the body was found; and has shown a motive for the killing.

Where there is no material controversy with regard to the premises where a homicide has been committed, it is not error to refuse to allow the jury to view the scene.

In a prosecution for murder, where the theory of the state is that the motive for the crime was robbery, it is not error to sustain an objection to the question as to what was the largest sum deceased ever had in the bank at any time, although the object of such testimony is to show the habit of deceased to keep his money in bank and not in his room.

In such cases it is not error for the court to refuse to charge the jury that at the time of the killing of deceased he was indebted to defendant in a large sum of money, where there is no controversy over the indebtedness.

The refusal of the court to allow counsel to except orally in the presence of the jury to the instructions given is not error.

Appeal from Superior Court, Island County.

John Fairchild, Daniel Kelleher, and Del Cary Smith,
for appellant.

R. W. Jennings, Prosecuting Attorney, for The State.

The opinion of the court was delivered by

SCOTT, J. — This case was here once before, and was reversed and remanded for a new trial. 3 Wash. 99 (28 Pac.

28). A change of venue was taken to Island county, and on a re-trial the defendant was convicted of murder in the second degree; whereupon he prosecuted this appeal. The errors complained of in appellant's brief, which were not waived at the oral argument, are as follows:

That the court erred in not sustaining the defendant's challenge to one of the jurors. This juror had heard what purported to be the facts relative to the killing of Deletis from several persons soon after it occurred. He, however, testified that he could disregard any impression he had received therefrom, and try the case fairly upon the evidence. After a somewhat full examination relating to his competency to sit as a juror, the court found that he was qualified, and we think the finding is justified by the testimony.

The next point complained of was the refusal of the court to permit an answer to the following question asked by defendant's attorney: "From the looks of things when you arrived there, was there anything about the appearance of the things in the room that would indicate that a scuffle had taken place there?" There was no error in this; it was merely asking for a conclusion of the witness. It was for the witness to state the condition of the room, etc., and for the jury to draw the conclusion.

The next matter complained of is with reference to the confession made by defendant that he killed Deletis, detailing the circumstances. A somewhat different state of facts is presented in this particular from that which was shown by the record on the former appeal. This is due in a measure to the fact that the testimony was taken by a stenographer at the last trial, and the parties had the benefit of his notes in making up the record, which was not the case on the former appeal. It is now contended by the defendant that this confession is inadmissible, for the reason that it clearly appears that the same was made under the influence of fear produced by threats. It now

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appears from the testimony of the witness Jones, who was called by the state, that upon approaching Coella immediately after the shooting, the witness and Delaney had pistols in their hands, which were kept pointed at the defendant; that the witness placed his left hand upon the defendant, and held his pistol in his right hand, pointed at Coella's head, or body; that the defendant said: "Please, Mr. Tommy, don't kill me; I want to tell you the truth;" that at this time the defendant was sitting down; that the witness asked him who killed Deletis, and the defendant answered that he killed him. It appears that the defendant was very much excited at this time, and was afraid of being killed by the parties present. While it does not appear that he was threatened by word of mouth, we agree with counsel for appellant that such a confession might be induced through fear occasioned by the acts of other parties, and it fairly appears that such was the case here. Nevertheless we do not think there is any error in the premises, for the reason that, at this particular time, the defendant only admitted that he killed Deletis, a fact which he at no time disputed. The theory of the defense was self-defense. The balance of the confession, wherein he detailed the manner of the killing, was made some considerable time after this, while the parties were on their way to Port Townsend, and after they had stopped for a short time at a wayside inn, and after the defendant had become composed in mind, and understood he was not in danger of immediate harm, but had been arrested for the purpose of placing him on trial for the killing of Deletis. The material facts in the confession made by him over which any controversy could or did arise were related at this time, and, under the circumstances, we think the confession was admissible in evidence, and the first statement made by him relative to the killing of

Deletis, which was made at the time the pistols were pointed at him, worked no injury and was harmless.

It is contended that the court erred in admitting the trunk and its contents in evidence, and also in admitting the gun, exhibit D. It is contended that the trunk was not admissible for the reason that a portion of its contents, consisting of watches, jewelry, and \$90 in gold, had been removed, and were not produced at the trial, and that it was error to admit the gun, for the reason that it was in no way connected with the killing. We see nothing in this, however, which could have resulted in any harm to the defendant. The trunk had been identified, and its contents fully accounted for by the testimony introduced, and the gun, together with the mallet with which the defendant admitted he struck the deceased, were part of the contents of the trunk.

The witness Kunkler was not called by the state at the last trial. The defendant called him, and sought to show by him that the reason he was not called by the state was that he would give testimony favorable to the defendant, and he was asked by defendant's counsel whether, after he had testified for the state at the former trial, one of the parties interested in the prosecution had found any fault with his testimony. This was objected to and excluded. It is contended that it was the duty of the prosecution to place Kunkler on the stand, and also that it was error for the court to refuse to permit the aforesaid question to be answered. But we do not think the state was bound to call Kunkler, and the reason why the state did not call him was wholly immaterial. He was present, and the defendant could have examined him with reference to his knowledge of the circumstances connected with the crime charged, and thus have secured the benefit of his testimony.

It is contended that the court erred in refusing to instruct the jury to find a verdict of not guilty, on the ground

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that the state had failed to prove the material allegations of the indictment. We think there was testimony introduced in support of all the material matters alleged, and that there was no error in this particular. The particular error complained of with reference to this is, that the jury found by its verdict that the killing was not premeditated, and in order to convict of murder in the second degree there must have been evidence of a malicious killing sufficient to convince them beyond a reasonable doubt. It is contended that there was not sufficient evidence to prove malice. In our opinion the evidence was sufficient to sustain a conviction of murder in the first degree in this particular. The manner of the killing, the weapons used, and the condition in which the body was found, were all shown; also a motive for the killing. He confessed that he hit Deletis on the head with a mallet, and cut his throat three times. This instruction was requested when the state had rested its case in chief, and under the testimony it was properly denied.

It is contended that the court erred in not allowing the jury to view the scene of the alleged homicide. This was a matter which was within the discretion of the trial court, and there does not appear to have been any abuse. A full description of the premises had been given in the testimony, and there does not seem to have been any material controversy with regard to the situation.

It is contended that it was error on the part of the state not to call one Thaggard as a witness, who had testified at the coroner's inquest; and, in connection therewith, that the court erred in instructing the jury as follows:

“I further instruct you, gentlemen of the jury, that you are to decide this case according to the evidence that has been introduced before you, and according to the instructions I have given you, and not according to what evidence might have been introduced and was not introduced, and not in accordance with any statements made by counsel

where those statements are not borne out or warranted by the facts introduced, if they are not so borne out or warranted."

It is contended that this instruction was erroneous in telling the jury that they were to decide the case "not according to evidence which might have been introduced, and was not," on the ground that it would lead the jury to believe that the state had a right to conceal testimony, and would deprive the defendant of whatever inference might be drawn against the state from its failure to have present and produce a witness who could give testimony with reference to the charge. Thaggard, however, was a witness at the trial for the defendant, and the defendant had the benefit of his testimony.

The next matter complained of is, that the court erred in sustaining the objection to the question as to what was the largest sum of money Deletis ever had in the bank at any time, as such testimony was offered for the purpose of showing that it was the habit of the deceased to keep his money in the bank, instead of in his room, and as tending to dispute the theory of the state that the crime was committed by the defendant for the purpose of robbery. The question, however, was irrelevant. It is immaterial how much money Deletis ever had in the bank at any one time. It is too indefinite for the purpose offered, and could not have any legitimate bearing.

At the conclusion of the judge's charge the defendant wanted to except orally thereto in the presence of the jury, and the court refused to permit him to do so, saying he would not allow him to take his exceptions until after the jury had retired. We think the court ruled properly in refusing to allow the defendant to take his exceptions in the presence of the jury. There was nothing to prevent the defendant from taking his exceptions in writing while the charge was being given, and submitting the same to

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Syllabus.

the court, and it appears he did take all the exceptions he desired to orally after the jury had retired. The only purpose under the appellant's theory that could be served in taking the exceptions orally in the presence of the jury would be to influence the jury thereby, and such influences should be prevented.

It is further contended the court erred in refusing to instruct the jury that at the time of the alleged killing the deceased was indebted to the defendant in the sum of \$1,350. There was no controversy as to this indebtedness, and evidence of a judgment obtained by Coella against the estate of Deletis therefor had been admitted. A refusal to give the instruction could not have worked injury to the defendant, whether he was entitled to it or not.

The case, on the whole, was apparently carefully tried, and we find no error therein.

Affirmed.

DUNBAR, C. J., and HOYT, STILES and ANDERS, JJ.,
CONCUR.

[No. 1187. Decided March 28, 1894.]

THE CITY OF PULLMAN, *Appellant*, v. J. A. HUNGATE
AND ELIZABETH HUNGATE, *Respondents*.

MUNICIPAL CORPORATIONS—VALIDATION OF VOID INCORPORATIONS.

The act of March 9, 1893 (Laws, p. 183), providing for the legalization of those cities and towns which had attempted to incorporate or re-incorporate under the act of March 27, 1890, where such bodies had, at the date of the passage of the act, an organized government, which had been maintained since the date of such attempted incorporation, is constitutional and sufficient to validate a *de facto* town which had attempted to incorporate under the void act of February 2, 1888, and again to re-incorporate under the unconstitutional provisions of §4 of the act of March 27, 1890. (STILES and ANDERS, JJ., dissent.)

8	519
8	659
36*	483
36*	484
8	519
13	708
8	519
9	112
36*	483
37*	306
8	519
16	432
8	519
90	89

Appeal from Superior Court, Whitman County.

V. E. Bull, for appellant.

Thomas Neill, for respondents.

The opinion of the court was delivered by

HORT, J.—But a single question is raised by the record in this case, and argued in the briefs of the respective parties, and that is as to whether or not the city of Pullman is a legal municipal corporation. It was originally incorporated under the law of February 2, 1888 (Laws, p. 221), and an attempt was made to re-incorporate under the provisions of § 4 of the act of March 27, 1890 (Laws, p. 133). The said act of 1888 was declared unconstitutional by this court in the case of *Territory v. Stewart*, 1 Wash. 98 (23 Pac. 405). And in the case of *Town of Denver v. Spokane Falls*, 7 Wash. 226 (34 Pac. 926), it was further held that attempted incorporations under said act could not re-incorporate under the act of March 27, 1890, for the reason that so much of said act as attempted to confer such right was unconstitutional.

It is claimed on the part of the respondents that these two decisions are decisive of the question involved in this appeal. Their contention in that regard must be sustained, unless the situation has been changed by the act of March 9, 1893 (Laws, p. 183), legalizing the incorporation or re-incorporation of cities and towns. Appellant contends that it appears from this act that it was the intent of the legislature to legalize all bodies which had incorporated or re-incorporated, or attempted to incorporate or re-incorporate, under the provisions of the act of March 27, 1890, and, construing all the language of said act in the light of the circumstances surrounding its enactment, such must be its construction. From which it will follow that, if said act can have force under our constitution,

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Opinion of the Court—HOYT, J.

cities like the one under consideration have been thereby transformed into organized bodies corporate.

It is claimed on the part of the respondents that, if this act be construed to apply to the attempt of cities incorporated under the act of 1888 to incorporate or re-incorporate, it will be unconstitutional for the reasons assigned by this court in the case of the *Town of Denver v. Spokane Falls, supra*. They argue in that behalf that since the provisions of the act of 1890, which purport to authorize the incorporation or re-incorporation of such towns, were unconstitutional, everything done thereunder would be absolutely void, and effectual for no purpose whatever. This is doubtless true, and if the act under consideration had stopped with the announcement of its intention to legalize such towns as had been so incorporated or re-incorporated, it would have been ineffectual for the purpose for which its aid is invoked by appellant here. But it did not stop there; it went further, and provided that if those bodies which had so attempted to incorporate or re-incorporate had, at the date of the passage of the act, an organized government which had been maintained since the date of such attempted incorporation, such organized bodies should thereafter be legal incorporations. In other words, the legislature did not seek specifically to legalize the incorporation or attempted incorporation which, being void, was, perhaps, incapable of legalization, but rather sought to legislate as to constituted bodies which, in fact, existed and were maintaining, under claim of authority so to do, the character of municipal corporations. In our opinion it was within the power of the legislature so to deal with these *de facto* bodies regardless of the question as to the rightfulness of their assumption of the powers under which they were purporting to act. In the absence of any constitutional inhibition as to special legislation, it would be competent for the legislature to take notice of the fact

that a body of men occupying a certain locality were assuming to exercise certain powers, and to declare that thereafter they should constitute a corporation with such powers as they had theretofore been assuming to exercise.

Such being the case, we see no reason why the legislature could not take notice of the fact that there was a class of such bodies, and enact laws in relation thereto without infringing the provisions of the constitution against special legislation. The fact that the inhabitants of a certain locality, by their own action, have assumed to act in a particular capacity distinguished from that of the people at large, so separates them as a class from the rest of the people of the state that the legislature may properly deal therewith in a different manner than with the rest of the people without its action being special legislation. It is true that there can hardly be such a thing as a corporation *de facto* in a strict sense, but it is equally true that there may well be such a segregation of a body of people in a certain locality, by their action and assumption of power, that they do in fact bear a different relation to the government from that of the people who have not so segregated themselves.

In our opinion, the act in question was constitutional as applied to cities like the one under consideration, and by its terms made them valid incorporations, with the powers and duties under which they were assuming to act at the date of its passage.

The judgment of the superior court must be reversed, and the cause remanded for further proceedings.

DUNBAR, C. J., and SCOTT, J., concur.

STILES, J. (*dissenting*).—I see no difference between this case and that of *Town of Denver v. Spokane Falls*. If the legislature could not pass a valid law having in contemplation the void incorporations attempted under the

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act of 1888, it could not do the same thing under the guise of a validation act in 1893.

ANDERS, J.—I concur in the above.

[No. 1204. Decided March 28, 1894.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE W.
MANVILLE, *Appellant*.

8	523
22	619
22	621

WITNESS—CORROBORATION—MISCONDUCT OF COUNSEL—INSTRUCTIONS—QUESTIONS OF FACT FOR JURY.

8	523
38	178

Where it is sought to impeach a witness by proof that the testimony given by him on the trial as to a certain matter was at variance with a statement made by him prior to the trial, the evidence of others who heard his statement is admissible in rebuttal of the impeaching testimony.

Although incompetent questions are asked by the prosecuting attorney upon the trial of a criminal case for the purpose of prejudicing the jury against the accused, the refusal of the court to rebuke the attorney therefor is not error, when the court, at the time of objection taken thereto, states to the jury that "they are to give no weight to that testimony which is ruled out."

The jury is the tribunal instituted by law to pass upon questions of fact, and, where there is a conflict of testimony, the verdict will not be disturbed by the courts.

Appeal from Superior Court, Thurston County.

Phil. Skillman, and *Dav. E. Baily*, for appellant.

Milo A. Root, Prosecuting Attorney, for The State.

The opinion of the court was delivered by

DUNBAR, C. J.—Appellant was tried upon an information filed against him on the 5th day of September, 1893, in the superior court of Thurston county, for the crime of murder in the first degree, committed by killing one J. S.

McCabe on the 3d day of August, 1893. The trial resulted in a verdict finding the appellant guilty of murder in the second degree. Motions in arrest of judgment and for a new trial were made and overruled by the court, and the court sentenced the appellant to imprisonment in the penitentiary for a period of fourteen years. From the ruling of the court in denying the motions in arrest of judgment and for a new trial, and from the judgment of the court, appellant appeals. The killing was not denied, the plea being self-defense.

Appellant has assigned as error a great many rulings of the court, both in the admission and exclusion of testimony, which have not been distinctively and especially argued, either in the brief or in the oral argument. We have, however, regarded them all as contested points and have examined them accordingly, and from such examination, without especially reviewing each assignment, have been unable to find error in any of them. We will now notice particularly the assignments upon which the appellant mainly relies for the reversal of his case.

During the progress of the trial appellant introduced Coroner Hartsock to prove that Conboy, a witness for the state, had made a statement to him the day after the tragedy occurred, concerning the manner in which the shooting was done; which statement was at variance with a material point made by him on the witness stand. The state, in rebuttal, introduced three witnesses, viz., Ragless, Foster and Wilson, who testified that the statement made by Conboy was substantially the same as the statement made by him on the witness stand. The appellant earnestly insists that the admission of this testimony was prejudicial error; that the testimony of a witness cannot be sustained by showing that his testimony corresponds with statements that he had previously made, citing *Ellicott v. Pearl*, 10 Pet. 412, to sustain this contention; and while the general

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doctrine announced in that case, and which is, no doubt, a correct doctrine, sustains appellant's contention, the exception made to the general rule is as plainly enunciated as the rule itself, and the case at bar falls squarely within the scope of the exception instead of the rule.

"Where parol proof," says Justice STORY, who rendered the opinion of the court in that case, "has been offered against the testimony of a witness under oath, in order to impeach his veracity, establishing that he has given a different account at another time, we are of opinion that, in general, evidence is not admissible, in order to confirm his testimony, to prove that at other times he has given the same account as he has under oath; for it is but his mere declaration of the fact; and that is not evidence. His testimony under oath is better evidence than his confirmatory declarations not under oath; and the repetition of his assertions does not carry his credibility further, if so far, as his oath. We say in general, because there are exceptions; but they are of a peculiar nature, not applicable to the circumstances of the present case, as where the testimony is assailed as a fabrication of a recent date, or a complaint recently made; for there, in order to repel such imputation, proof of the antecedent declaration of the party may be admitted."

The defendant in this case assailed the testimony of Conboy as a fabrication. That was the object of Hartsock's testimony, to make it appear to the jury that at first Conboy had told the truth, but that subsequently he had fabricated the statement which he made under oath. In fact this is the exact theory yet maintained by the appellant, for in his brief he says:

"Now, throwing aside the evidence of both the appellant and Conboy, as given on the trial, the evidence as given by Hartsock as to what Conboy said immediately after the occurrence, while it was yet fresh in his mind, and before his revengeful feeling could be crystallized into shape, should control."

The rule governing cases of this kind is thus announced in Wharton's Criminal Evidence, § 492:

“When a witness is assailed on the ground that he narrated the facts differently on former occasions, while on re-examination it is competent for him to give the circumstances under which the narration was made, it is ordinarily incompetent to sustain him by proof that on other occasions his statements were in harmony with those made on the trial. On the other hand, where the opposing case is that the witness testified under corrupt motives, or where the impeaching evidence goes to charge the witness with a recent fabrication of his testimony, it is but proper that such evidence should be rebutted.”

See, also, many cases cited to sustain the text.

This, we think, is now the almost universal holding of modern courts, while many courts go further and hold, not of course that a witness can be allowed to manufacture testimony by making a statement in advance and then showing that statement in proof of the correctness of his statement under oath, because it would obviously be no confirmation at all, as testimony under oath is certainly to have more weight than the loose statements made without the solemnity of an oath, but that such statements are properly admissible as confirmatory evidence where the witness' credit is impeached. *Regina v. Megson*, 9 Car. & P., p. 418.

In Indiana it seems to be the universal holding that, if a witness be impeached by proof of his having previously made statements inconsistent with his testimony, he may be corroborated by evidence of other statements made by him in accordance with his testimony. *Clark v. Bond*, 29 Ind. 555; *Harris v. State*, 30 Ind. 131; *Brookbank v. State*, 55 Ind. 169.

But whatever distinctions the authorities may have made in reference to the admission of this kind of testimony, practically all of them would sanction its admission under

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the circumstances of this case; and outside of the legal proposition discussed, it seems to us that this testimony was plainly admissible to show, or at least to tend to show, that Conboy did not make the statements attributed to him by Hartsock, but that Hartsock was mistaken. It was the same conversation that they were testifying to that Hartsock had testified to, not an attempt to prove that at some other time and place the witness had made another or different statement. The jury certainly had a right to the testimony of all the witnesses to the conversation to aid them in determining whether or not the witness made the statement attributed to him by the defendant's witness. This, it seems to us, was the object of this testimony. Certainly this was the practical effect of it.

During the cross examination of the appellant he was asked by the attorney for the state if he did not state to the sheriff on the day of McCabe's funeral that, "if there has been no accident or slip, McCabe was in hell by this time." This question was objected to as incompetent and immaterial, and the court refused to admit it, on the ground that it was not proper cross examination. The question was then asked for the avowed purpose of laying the ground for impeachment. This was objected to, and the objection was sustained. Appellant's counsel then desired to note an exception to the asking of any questions of this sort before the jury; whereupon the court made the following statement to the jury:

"The jury will understand that when they retire their verdict must be made up on the evidence that is given, and they are to give no weight to that testimony which is ruled out."

This statement by the court to the jury, the appellant contends, was not sufficient, but that the court ought to have proceeded to rebuke the attorneys for the state for asking the question. We hardly see how such a procedure

on the part of the court could have been any benefit to appellant's cause. If anything, it would have made the question a more prominent one in their minds, and a more lasting one in their memories. The court plainly instructed the jury that they were not to consider evidence which was ruled out. The instruction was with direct reference to this question, and made at the time the question was asked; and even if we should conclude that it was an improper question to ask on cross examination, as tending to show the animus of the defendant, who was then testifying in his own behalf, the court certainly went as far as he was justified under the circumstances in going, when he instructed the jury that such questions should have no weight with them in the determination of their verdict. This was a long and tedious case, and, it seems to us, is unusually free from error on the part of the court.

It is contended by the appellant that the testimony does not sustain the verdict; but in the absence of any legal error we do not feel justified in disturbing the verdict of the jury. It is a well established principle that the jury is the tribunal instituted by law to pass upon questions of fact, and where there is a conflict of testimony their verdict will not be disturbed by the courts. This has been the uniform holding of this court and of all other courts; and, in fact, there can be no other holding under the law. This case presents, in its most radical form, a violent conflict of testimony. Defendant Manville and his wife both positively swear that McCabe and Conboy were down at the scene of the tragedy during the afternoon of the day of the shooting and a short time prior to the shooting, relating in detail circumstances that occurred there; while Conboy and Mrs. McCabe both as positively swear, from their personal knowledge and observation, that neither McCabe nor Conboy was down at that part of the farm, or, in fact, away from McCabe's house until they went

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down at the time the shooting occurred. There is no possible way of reconciling this unfortunate and lamentable conflict in the testimony. If the statement of Manville and his wife is true, it would go a long way towards impeaching the testimony of Conboy when he comes to testify to what occurred at the time of the shooting. Upon the other hand, if the testimony of Conboy and Mrs. McCabe is true, then Manville is utterly unworthy of belief. The jury heard all this conflicting testimony, saw the witnesses on the stand, their appearance and their manner of testifying. The credibility of the witnesses is by the law especially submitted to their discretion. The appellant was tried by an impartial court; he was defended both here and in the court below by faithful, earnest and competent counsel; his testimony and the testimony of the witnesses for the state was weighed by a jury of his peers under proper instructions by the court. Their verdict was against him and he must submit to it.

The judgment is, therefore, affirmed.

STILES, SCOTT, ANDERS and HOYT, JJ., concur.

[No. 973. Decided March 29, 1894.]

THOMAS PHILLIPS AND HATTIE E. PHILLIPS, *Appellants*,
v. PORT TOWNSEND LODGE, No. 6, F. & A. M., *Respondent*.

STATEMENT OF FACTS—NOTICE OF SETTLEMENT—ACTION OF FORCIBLE ENTRY AND DETAINER—COUNTERCLAIM AND EQUITABLE DEFENSES.

The fact that notice of the settlement of a statement of facts was given prior to the rendition of judgment, is not ground for striking the statement, when the notice designated a day subsequent to the judgment as the time at which the application for settlement would be made.

24—8 WASH.

8	529
25	115
125	116
8	529
27	388
127	389
8	529
233	457
8	529
34	609

In an action instituted by a landlord against a tenant for rent, under the forcible entry and detainer act (Laws, 1891, p. 179), an answer setting up a counterclaim on account of repairs made by the tenant which it was the duty of the landlord to make, is demurrable on the ground that it does not state a defense.

Semble: In such an action defendant cannot interpose an answer alleging that in drawing up the lease certain terms thereof were omitted by mutual mistake, and asking that the lease be reformed to express the contract of the parties.

Appeal from Superior Court, Jefferson County.

Carroll & Rohde, for appellants.

Johnson & Moody, for respondent.

The opinion of the court was delivered by

ANDERS, J.—The respondent moves this court to strike the statement of facts herein from the record, and to dismiss the appeal—(1) Because the notice to settle said statement was prematurely given; and (2) because all of the evidence upon which the case was tried in the court below, together with the objections and exceptions taken to the reception or rejection of testimony, is not in the record.

It seems, from the date of filing, that the notice to settle the statement was given prior to the rendition of judgment, but designated a day subsequent to the judgment as the time at which the application for settlement would be made to the judge. The same objection was raised before the lower court that is now insisted on here, and we think the learned judge did right in disregarding it. It is not contended that the respondent did not have actual notice of the proceeding, and we think the point made is not sufficient to justify us in depriving the appellants of a trial on the merits in this court. The court below certifies that the statement contains all the material facts in the cause, and that is sufficient under the statute and the previous decisions of this court.

The motion must be denied.

On August 22, 1891, the appellants leased to the respondent the upper story of a certain building owned by them in Port Townsend for the period of five years from and after September 1, 1891, at a stipulated rent, payable monthly in advance. A written lease was executed in duplicate in every respect in conformity with law.

The respondent took possession of the premises under the lease, and paid the rent for the month of September, but neglected and refused to make further payments; whereupon, in the month of January, 1892, the appellants instituted this proceeding for the possession of the demised premises, and to recover rent for the same under the forcible entry and detainer act of March 7, 1891. The respondent answered, admitting the execution of the lease as alleged in the complaint, and not denying the non-payment of the rent reserved, and pleaded as a defense and counterclaim that it was mutually agreed and understood between all the parties to the lease that the plaintiffs were to keep the roof of the leased building in repair at their own cost and expense; but, by mutual mistake, and without the fault of the defendant, the covenant to repair and preserve said roof was omitted from the written lease; that the plaintiffs, at the time of the agreement to lease, and at the time of the execution thereof, willfully and fraudulently represented to defendant that the roof on the said premises was good and sound, when in fact said roof was unsound and insufficient to protect said premises from the elements, all of which was known to plaintiffs, and defendant, relying upon said representations, proceeded to repair, alter and occupy said premises; that upon failure of the plaintiffs, upon notice from defendant, to repair said roof, the defendant put a new roof upon said building at an expense of \$225, and charged said sum to the plaintiffs, and asked for a reformation of the lease and for a judgment against plaintiffs for \$125, being the difference between the rent

admitted to be due and the cost of the alleged expenditure in repairing the roof. The plaintiffs interposed a general demurrer to the affirmative defense and counterclaim, which was overruled, and exception taken, after which the plaintiffs replied, denying generally the new matter in the answer. A trial was had, resulting in a judgment of non-suit, on motion of defendant, but a new trial was granted on condition that the plaintiffs would amend their complaint by alleging that they were entitled to the possession of the demised premises at the time of the commencement of the action. This the plaintiffs did, and it was thereupon stipulated that the original answer should be deemed an answer to the amended complaint, and that the original reply should stand as the reply thereto.

Upon the second trial all of the issues raised by the pleadings were submitted to a jury, who found specially that there was an agreement between the plaintiffs, or Thomas Phillips, and the defendant, before the signing and execution of the lease in question, that the roof of the premises to be leased was in good repair and condition, and would be kept so by plaintiffs during the continuance of the lease, but that this agreement was not omitted from the lease on account of false and fraudulent representations of plaintiff, Thomas Phillips, to the defendant, but by mutual mistake or misunderstanding. The jury also returned a general verdict in favor of the defendant for the sum of \$125. The court entered a decree requiring the appellants to execute a new lease containing a covenant to keep the roof of the said building in repair and a judgment for defendant for the said sum of \$125, and plaintiffs appealed.

The appellants did not on the second trial specifically renew their demurrer to the counterclaim set up in the answer, and the respondent for that reason insists that they cannot now avail themselves of it, and cannot be heard to make the objection that the affirmative matter contained

in the answer does not constitute a defense. But it must be remembered that no new answer was filed, and that the demurrer to the only answer on file had already been overruled. The appellants therefore had a right to presume that the sufficiency of the pleading had been finally determined by the court, and that a renewal of the demurrer would be useless. They did raise the same question, however, in another form, by objecting to the testimony offered in support of the plea, which fact of itself shows that they did not intend to waive it. We, therefore, think the appellants are entitled to the opinion of this court as to the sufficiency of the defense interposed to the cause of action stated in the complaint.

In our judgment the demurrer should have been sustained. The very object the legislature had in view in enacting the statute under which the appellants were proceeding was to afford a summary and adequate remedy for obtaining possession of premises withheld by tenants in violation of the covenants of their lease, and this object would be entirely frustrated if tenants were permitted to interpose every defense usual or permissible in ordinary actions at law. The statute prescribes that a tenant is guilty of unlawful detainer, after default in the payment of rent pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment or possession of the property, shall have been served upon him. Laws 1891, p. 180. And when these facts are made to appear to the satisfaction of the court or jury upon the trial, the landlord is entitled to judgment for restitution of the premises, and also to judgment declaring the forfeiture of such lease or agreement, together with damages and the rent found due. In such proceedings counterclaims and offsets are not available. *Ralph v. Lomer*, 3 Wash. 401 (28 Pac. 760); *Warburton v. Doble*, 38 Cal. 619; *Kelley v. Teague*, 63 Cal. 68; *McSloy v. Ryan*,

27 Mich. 110; *Abrams v. Watson*, 59 Ala. 524; *People v. Walton*, 2 Thompson & C. 533.

And as, under the statute, all issues of fact must be tried by jury, unless a jury be waived, as in other actions at law, it would seem that purely equitable defenses in such cases were not contemplated by the legislature. But, be that as it may, it would be no defense to this proceeding if it were a fact that a covenant to repair had been actually inserted in the lease in the first instance and had been broken by the appellants prior to the commencement of this proceeding. Violations of such covenants by a landlord will not even authorize an injunction to restrain summary proceedings to dispossess a tenant unlawfully holding over, especially in the absence of a showing of insolvency. *Huff v. Markham*, 70 Ga. 284; 71 Ga. 555.

If the respondent desired a reformation of the lease in question, it should have invoked the equity power of the court for that relief, and applied for an injunction to restrain this proceeding during the pendency of that action. But, even in such cases, equity will not interfere except in extraordinary cases, and where irreparable injury would otherwise result. Where compensatory damages may be recovered in an action at law, there is no occasion for the interference of equity. It may not be improper here to remark that the evidence in the record in this case wholly fails to show that the respondent was entitled to the reformation of the lease as prayed for and granted, or to the money judgment recovered. The testimony, under the most favorable construction, only shows that one of the appellants, Thomas Phillips, said some days prior to the execution of the lease, that the roof of the leased building was in good repair, and he would keep it so. But there is substantially no evidence whatever that either of the appellants ever promised or agreed or understood that a covenant to repair was to be inserted in the lease. In fact,

the testimony of the secretary of the respondent corporation, who testified at the trial, was that he had read the lease before signing it, and knew that it contained no covenant to repair, and did not think it needed such a covenant. Indeed, the lease itself contains a covenant on the part of the respondent to receive the premises as they "now are," and keep the same in good repair, etc. Before a court of equity will decree a reformation of a contract which has been reduced to writing, the evidence of mistake and of the alleged modification must be clear and convincing. Pomeroy, Contracts, § 246; *Wilson v. Deen*, 74 N. Y. 531.

The respondent not having shown any ground for reformation of the lease, it had no right to make repairs at the expense of appellants, and therefore the judgment in its favor for the sum alleged to have been so expended was unjust and unwarranted. It is only in those cases, if any, where a landlord has covenanted to repair, that his failure to do so will authorize his tenant to repair at his expense. *Van Every v. Ogg*, 59 Cal. 563.

Objections are made to the instructions of the court to the jury. Several of them are not applicable to the facts proven; but as most of the matters therein referred to will not arise on a new trial, it is not necessary to discuss them in detail at this time.

The judgment and decree must be reversed, and the cause remanded to the court below for a new trial in accordance with this opinion and the provisions of ch. 96 of the laws of 1891 (Code Proc., tit. 9, ch. 2).

DUNBAR, C. J., and STILES, HOYT and SCOTT, JJ.,
concur.

8	536
17	369
8	536
23	519
8	536
40	446

[No. 1166. Decided March 29, 1894.]

PHILIP F. KELLY, *Respondent*, v. W. A. RYAN, *Clerk*,
Appellant.

COSTS IN GARNISHMENT PROCEEDINGS—CLERK'S FEE.

A garnishment proceeding being but auxiliary to the principal action in which it is instituted, the plaintiff, on applying for the writ, is not required to pay the clerk's fee of four dollars, which the fee act provides must be paid by the party instituting an action or proceeding. (ANDERS and HORT, JJ., dissent.)

Appeal from Superior Court, Pierce County.

Snell & Bedford, for appellant.

The opinion of the court was delivered by .

SCOTT, J.—In a certain action commenced by respondent against one Wallerstein, in the superior court of Pierce county, judgment was rendered in favor of the plaintiff. Thereafter, said judgment being unpaid, the attorney for the plaintiff made an affidavit for a writ of garnishment against one Williams, and thereupon applied to appellant, the clerk of said court, for such writ, who refused to issue the same unless an advance fee of \$4 was paid. Plaintiff refused to make such payment, and applied to said court for a writ of mandate to compel the issuance of the writ aforesaid. A demurrer was interposed by appellant to this application, trial was had and the court granted the writ, and from said order this appeal is prosecuted. A brief was filed by appellant, but there was no appearance by respondent.

The only question raised is as to whether the payment of said fee is a prerequisite to the issuance of a writ of garnishment, and this involves a consideration of the law relating to garnishments and some of the provisions of the

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fee act, both of which were passed at the last session of the legislature. See Laws 1893, pp. 95, 421.

We find in the record an opinion by the learned judge who sat at the trial in the superior court and before whom the cause was argued by both parties, and we embody much of it in substance herein.

* It is provided in the fee act that the plaintiff, or other party instituting an action or proceeding, shall pay, when the cause is entered in the court, or when the first paper on his part is filed therein, a fee of \$4. Section 4 of the garnishment act (Laws 1893, p. 96) provides that the case shall be docketed in the name of the plaintiff as plaintiff and of the garnishee as defendant. It is further provided in said act that a writ shall be issued and served on the garnishee in like manner as a summons is served, and provision is made for an issue and trial in case either the plaintiff or the principal defendant desires to controvert the answer of the garnishee.

The question is presented whether, as contended by appellant, a garnishment proceeding under the provisions of this act is an independent suit or proceeding, or whether it must be regarded only as auxiliary to the original cause. If the latter view is the correct one, then the services of the clerk in issuing the writ of garnishment are but a part of the services which he is required to perform in the original action, for which he is not entitled to charge any fees under the provisions of the fee act. A part of subdivision 5, § 2, reads as follows.

“The fees prescribed in this section shall be in full for all services performed by the clerk of the superior courts in the progress of civil actions and proceedings other than probate causes, from the beginning thereof down to and including the entry, collection and satisfaction of final judgment therein, and including all proceedings in open court, and all entries, filings and recording therein except for the

recording and transcribing for which special fees are prescribed in this section.”

It will be observed that the law relating to garnishments provides for the prosecution of garnishments while the original action is pending and undetermined as well as after judgment. The law does not in terms require notice thereof to be served on the principal defendant, although it provides that he may appear and contest the answer of the garnishee. It provides further, in all cases, that the principal defendant shall be concluded by the proceedings in garnishment from recovering of the garnishee any money or property obtained from him in pursuance of such proceedings, whether paid or surrendered under the admissions of his answer and the judgment thereon, or to satisfy a judgment rendered against him after a contest.

If a proceeding in garnishment under this act is an independent action or proceeding, a grave question would arise as to whether it is not unconstitutional in failing to specifically provide for a notice to the principal defendant. If it be but a proceeding in the original action it may be that the defendant would be bound to take notice thereof and would be held to have had notice of all proceedings therein prior to the satisfaction of the judgment obtained against him. The act should receive such a construction as will allow it to be sustained under the constitution, if possible. The fact that the garnishment case is to be separately docketed is not incompatible with a legislative intent that it should be a proceeding in the original action. It may retain the same number as the original action. It can well be held to be but a step or proceeding instituted in an action pending, or if brought after judgment, only one of the steps or proceedings to which resort may be had to enforce the collection of that judgment. It is inseparably connected with the result of the pending

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action, and if the original action has been concluded to judgment, then it is limited by that judgment. It may be determined with or without an issue, and whether or not an issue will arise cannot be known at the inception of the proceeding. Consequently, if the fee must be paid in any case, it must be paid in all, regardless of the unknown course the particular proceeding may take.

We think the judgment of the superior court was right, and it is affirmed.

DUNBAR, C. J., and STILES, J., concur.

ANDERS, J.—I think a garnishment proceeding under the statute is an action, or at least an independent proceeding, and that the advance fee should therefore be paid.

HOYT, J.—I am of the same opinion as Judge ANDERS.

[No. 1251. Decided March 29, 1894.]

GEORGE REED, *Respondent*, v. THE BANK OF COMMERCE OF CENTRALIA, WASHINGTON, *Appellant*.

BILL OF SALE—INDEFINITE DESCRIPTION OF PROPERTY—POSSESSION OF PURCHASER—CHATTEL MORTGAGE—VALIDITY—POSSESSION OF MORTGAGEE.

Although the description of property contained in a bill of sale thereof may be too uncertain and indefinite to indicate what property is included, yet where the purchaser has taken possession thereof his title is superior to that of a subsequent mortgagee of the property.

Where possession of goods is taken under a chattel mortgage thereof, the fact that the mortgage contains no affidavit as to its execution having been in good faith will not affect the rights of the mortgagee.

Appeal from Superior Court, Lewis County.

Action by George Reed against the Bank of Commerce of Centralia, Washington, for the conversion of a quantity of shingles. The plaintiff claimed the right of possession under a chattel mortgage. The defendant claimed to have taken possession of the shingles in controversy, prior to the execution of the chattel mortgage, under various bills of sale of different quantities of shingles given by the mortgagor as pledges for advances of money. From a judgment for plaintiff defendant appeals.

Frank C. Landrum, and Edward F. Hunter, for appellant.
George E. Rhodes, and A. E. Rice, for respondent.

The opinion of the court was delivered by

HOTT, J.—Under the issues made by the pleadings, the trial court admitted evidence in regard to a large number of questions of fact, and instructed the jury in relation thereto. Numerous errors growing out of the admission of such testimony, and of the action of the court in regard thereto, and in instructing the jury, are assigned as reasons for the reversal of the judgment.

In our opinion there was under the pleadings and proofs but a single issue, the determination of which depended upon disputed questions of fact, and, except as to issues to which there could have been little or no controversy, the verdict of the jury should have been made to depend thereon, and that was as to whether or not the appellant had taken possession of the shingles before the execution of the mortgage under which the respondent claimed. The bills of sale introduced in evidence by the appellant were void for uncertainty in description, except as aided by the taking of possession thereunder. There was no such definite description of any particular shingles as would enable an officer to take possession, if required to do so under the

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terms of the bills of sale. If, however, possession of any particular portion of the shingles was by the consent of the parties to the bills of sale transferred to the appellant, and such possession was maintained, there would be no question but that, as to the shingles thus taken possession of, the appellant's title would be superior to that of the mortgagor or those claiming under him until the amount for which they were pledged had been paid. Hence the question as to whether or not the mortgage, under which respondent claimed, was properly executed could have no influence upon the decision.

There is another reason why the question of the proper execution of said mortgage was an immaterial one under the undisputed facts of the case. It is not pretended but that, excepting as influenced by the question of which we have just been speaking, there was a change of possession from the mortgagor to the mortgagee, and such being the fact the alleged defect in the execution of the mortgage would be immaterial, as the authorities all agree that where possession is taken under the mortgage the rights of the mortgagee do not depend upon the affidavit as to its execution having been in good faith.

It will follow that the respondent was entitled to recover for the shingles unless the appellant was in possession at the date of the execution of the mortgage as above stated. If in the trial of the cause the court had correctly submitted this question to the jury, the other errors complained of, if errors they were, would not in our opinion justify us in awarding a new trial. A careful examination of the instructions, and of the course of the trial, has satisfied us that the question of the possession by appellant was not properly submitted to the jury.

The judgment will, therefore, be reversed, and the cause remanded for a new trial in accordance with this opinion.

DUNBAR, C. J., and STILES, ANDERS, and SCOTT, JJ.,
concur.

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15 391

[No. 1072. Decided March 30, 1894.]

CARM DIBBLE, *Respondent*, v. JAMES P. DEMATTOS, *Appellant*.

ACTION FOR MONEY HAD AND RECEIVED—SUFFICIENCY OF EVIDENCE—STATUTE OF FRAUDS—DEBT OF ANOTHER.

In an action for money had and received there is sufficient evidence to sustain a verdict of the jury in favor of plaintiff, when the testimony shows that plaintiff expended money in payment of laborers upon defendant's building upon the promise of defendant that it should be refunded, although the testimony also shows that plaintiff was one of the sureties upon the bond of a defaulting contractor, who had absconded, leaving due to the laborers upon defendant's building the amount of money so paid out by plaintiff. (HOYT and STILES, JJ., dissent.)

Where a contractor upon a building has absconded, leaving unpaid labor bills, the promise of the owner of the building to a third party that, if he would pay the money due so the work could progress at once, the money should be refunded, is not a promise to answer for the debt of another, and does not therefore fall within the statute of frauds.

Appeal from Superior Court, Whatcom County.

Bruce & Brown, for appellant.

Dorr, Hadley & Hadley, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—This is an action by the respondent against the appellant to recover the sum of \$986.33, together with interest thereon from the 15th day of August, 1890, for money alleged to have been paid by the said respondent to and for the use of said appellant. The answer is a general denial. At the close of the testimony on the part of the plaintiff, defendant moved for a non-suit, which motion was overruled. The trial proceeded and the jury returned a verdict in favor of the plaintiff for the sum demanded, upon which judgment was rendered, and from such judgment is prosecuted this appeal.

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It is earnestly contended that the court erred in not granting appellant's motion for a non-suit, and that if respondent proved any cause of action at all, the proof was a fatal variance from the allegations in the complaint; that the action was based upon a contract, and that the evidence, if it proved any case at all, proved an action in tort. It is insisted that the case falls within the rule laid down by this court in *Distler v. Dabney*, 3 Wash. 200 (28 Pac. 335), and *Clark v. Sherman*, 5 Wash. 681 (32 Pac. 771). This contention, it seems to us, is not sustained by the record in this case. In *Distler v. Dabney* it was decided that—

“Under the provisions of the code abolishing all forms of pleading inconsistent therewith and requiring the complaint to contain a plain and concise statement of facts constituting the cause of action, an action for money had and received is not supported by proof that plaintiff had paid defendant certain sums of money upon a written contract for the conveyance of land, which had been rescinded by the plaintiff on the ground that defendant had failed to deliver a deed to said land within the time prescribed by the contract.”

In that case the ground of action set forth in the complaint was totally abandoned and the plaintiff sought to recover on the allegations of his reply, which showed an entirely different and distinct cause of action. *Clark v. Sherman*, *supra*, was substantially the same kind of a case, the court holding that a plaintiff could not allege one cause of action in his complaint, and then, by means of a reply, recover upon an entirely different cause of action.

But in this case the allegation of the complaint is that the money was paid at the special instance and request of the defendant and for his use and benefit, and it seems to us that if the testimony of the respondent is found to be true, he has directly proved this cause of action. Appellant's motion for a non-suit was based upon the same theory. But it appears to us that there is sufficient evi-

dence offered by the respondent, if believed by the jury, to sustain the verdict, and to entitle respondent to the judgment which he obtained.

Of course, the case was tried by appellant on the theory that the money which was paid by the respondent was paid by him as bondsman of Jordan, the defaulting contractor. But such is not the testimony of the respondent. Respondent Dibble testifies that in the conversation with DeMattos, DeMattos told him to go on and pay the men; that there was enough money to pay for the building and he (meaning DeMattos) would pay the money before he would have the work stopped. In answer to the question, "What, if anything, was said about the repayment of this money to you?" the witness testified, "He said that there was enough to complete that building and more, too, and that all the bills were paid up to that time, and to pay the men and it would be refunded." This contention he stoutly maintained through both his direct and his cross-examination, and in spite of the attempt of the attorney for the appellant to make it appear that he paid the money on the strength of his being a bondsman for Jordan. He stated that DeMattos told him to go ahead and pay off the men and that the money was ready to repay him. The following excerpt from the testimony shows conclusively what the theory of the witness was in regard to the transaction:

"Q. (On cross examination.) He told you if you gentlemen would finish the building he would pay you what still remained unpaid? A. No, sir.

"Q. You swore that on the trial before. A. You show it up if you can.

"Q. Didn't you testify before that what DeMattos said to you was that if you gentlemen would go on and complete the building he would pay the money that was yet in his hands? A. No, sir; I did not.

"Q. And that he had money enough he thought to complete the building? A. No, sir; get in and show that evidence.

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“Q. I will ask you, Mr. Dibble, if these men whom you paid off were not men who worked on that building for you as bondsmen? A. No, sir.

“Q. And you didn’t so swear when the case was before the court before? A. No, sir; these men were paid for services, for work done before I ever went there.

“Q. Didn’t you hire these men yourself? A. No, sir.

“Q. Hire them subsequent to that time? A. No, sir; I never hired those men. DeMattos said to pay those men off.”

He also testified that the money that was paid was paid for work that was done before he had this conversation with DeMattos. The testimony of H. A. White is also directly to this point, and as positive as it can well be. When instructed to state what was said about paying off these men, his answer was: “He said to pay these men off; to pay them off and he would give it back again.” Again, in cross examination, he states that DeMattos said that the architect had made very low estimates so that there was plenty of money to finish the building; and that he told Mr. Dibble if he would pay the money, he would pay him back.

That the effect of the witness’ testimony was well understood by appellant’s counsel is shown by the following question in cross examination:

“Didn’t you think it a little strange that DeMattos wanted him to pay that money when DeMattos intended to repay him out of money on hand? A. I don’t remember that I did.”

Witness Charles Broah also testified as follows:

“I don’t remember whether or not Dibble said he would pay the money over, but at any rate the judge said if they would pay the money he would pay them back; pay the men so that the work would go on.

“Q. To whom did he say that? A. I believe to Dibble there.”

Then appellant's counsel undertook to construe witness' testimony as follows:

“Q. What he said to Dibble at that time was that there was money enough on hand he thought, and if they would go to work, that is Dibble and the bondsmen, and complete the building, that he would pay them the money remaining in his hands? A. I didn't understand it in that way.”

And after further cross examination, the witness finally made the broad statement as follows: “He said, ‘If you pay the bills I will pay you back.’”

There was other testimony to the same effect by other witnesses, so that it is plain that the court would not have been justified in taking the case from the jury, as there certainly had been sufficient testimony to establish the fact that the appellant had told the respondent to pay the workmen and that he would refund the money, or, in other words, as a witness states it, “pay him back.” And if that be true, and there was sufficient testimony upon which to base a judgment, if uncontradicted, then the verdict of the jury will not be disturbed; for it is their especial province to weigh the testimony. Whatever this court might think of the probabilities or improbabilities of the truthfulness of the statements related by the witnesses, and the reasonableness or unreasonableness of their statements, can have little effect.

It is true that the testimony of the appellant flatly contradicts the testimony furnished by the respondent on this material point, but the jury was the judge of the credibility of the witnesses. They saw fit to believe the testimony of the respondent, and rendered their verdict accordingly, and if the testimony was legally submitted, under proper instructions by the court, it will not be disturbed here.

It is contended by the appellant that, conceding the statement of the respondent to be true, it was a promise to answer for the debt or default of another, and conse-

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Dissenting Opinion — HORT, J.

quently fell within the statute of frauds, being a verbal promise. But, as we understand the testimony, it was in no sense a promise to answer for the debt of another, but an original contract or undertaking entered into by the appellant, with the respondent, for the benefit of the appellant, and the testimony shows that the consideration supporting the promise was the benefits accruing to appellant by reason of the work on his house being continued.

We have carefully examined the instructions of the court and are satisfied that as a whole they state the law governing the case correctly, and that all the instructions which were necessary and proper for the guidance of the jury in determining their verdict were given by the court.

The case, it seems to us, is a simple question of fact. If DeMattos made the statements to Dibble that are attributed to him by Dibble and other witnesses introduced by the respondent, he is responsible for the amount claimed by the complaint; and that he did make such statements the jury must have concluded, and they have rendered their verdict accordingly.

The judgment will be affirmed.

ANDERS and SCOTT, JJ., concur.

HORT, J. (*dissenting*).—In my opinion plaintiff's own testimony, and that of his witnesses, when interpreted in the light of all the surrounding circumstances, failed to show any such promise on the part of the defendant as that upon which the complaint was founded. Such testimony, when so interpreted, shows that any statement as to the repayment of the moneys which the plaintiff should advance to the men who had been employed upon the building, and for which this action is brought, was made in view of its being taken from the amount which would be coming to the contractor or his bondsmen upon the completion of the buildings in accordance with the terms

of the contract. Plaintiff's own testimony is to the effect that that was one of the things which were discussed during the interview when it was alleged the promise was made, and that prior to such alleged promise the defendant had stated that there was enough money unpaid upon the contract to complete the building, and that it was after such statement that defendant said what he did about the repayment of the money which the plaintiff should advance to the men to induce them to remain upon the work. Interpreting the alleged statement of the defendant in the light of the subject matter under consideration, there is not enough shown thereby to authorize a finding by the jury of an absolute promise to pay. The most that could be found therefrom was a promise to pay if the work on the building was continued to completion by or on behalf of the contractor or his bondsmen. To my mind there was nothing said in the entire conversation that tended to show that it was intended on the part of the owner to relieve the bondsmen from their responsibility or on their part to be relieved.

It follows that if any liability was established as against the defendant it was one sounding in tort, and not upon contract, and could not have been recovered for under the complaint in this action. I think that the judgment should be reversed.

STILES, J. (*dissenting*).—There ought to have been a non-suit as soon as it developed that the parties had a contract of suretyship between them. If respondent was a bondsman for Jordan, and Jordan abandoned the building, leaving bills unpaid, it became respondent's obligation to pay them off before he could demand any unpaid contract money from appellant. Therefore, being under such an obligation, it is wholly immaterial whether appellant promised to repay or not, the promise was void, and what may

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or may not have been the facts makes no difference. The plaintiff ought to have been relegated to a suit based upon his rights under the bond. As it is, he has now been allowed to repudiate the bond *pro tanto*, without any consideration of its merits as a binding obligation.

[No. 1225. Decided March 30, 1894.]

BOOTH & HANFORD ABSTRACT CO., *Appellant*, v. BYRON PHELPS, *County Treasurer, Respondent*.

TAXATION—PERSONAL PROPERTY—ABSTRACT BOOKS.

A set of abstract books, although compiled in the form of abbreviations and cipher, so as to be intelligible to but few persons, is personal property having a money value, and is subject to taxation under the laws of this state.

Appeal from Superior Court, King County.

Relfe & Brinker, for appellant.

John F. Miller, and *A. G. McBride*, for respondent.

The opinion of the court was delivered by

SCOTT, J.—This was a suit to enjoin the selling of a certain set of abstract books belonging to appellant, for state and county taxes. At the close of appellant's case the court granted a motion for non-suit, from which judgment this appeal was taken.

The constitution provides that—

“The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money.” Art. 7, § 2.

An act of the legislature, Laws 1889–90, p. 530, § 1, provides that—

“All real and personal property in this state, and all personal property of persons residing therein, the property

of corporations now existing, or hereafter created, except such as is hereinafter expressly excepted, is subject to taxation."

And the only question involved in this case is whether a set of abstract books is included within the term "personal property," for the purposes of taxation. The proof shows that the information contained in the books is largely in the form of abbreviations and cipher peculiar to that particular set of books, and only five persons understood them, as far as was known to the manager and secretary of the company, that no information could be derived from the books except by an expert in that line of business, and that it would be necessary for him to understand such abbreviations and cipher.

It is contended that the books were of no value to the public or to any one who did not understand them; that while the books originally in blank form were of some value, the fact that they contained such writings had destroyed this value even, and that they are not assessable for the purpose of taxation. There was some proof, however, to show that certain maps connected with the business had a general value to the extent perhaps of a hundred dollars.

We are of the opinion that the property was subject to taxation. The fact that it requires the services of an expert to obtain the necessary information from the books may detract from their value in a general sense, but would not deprive them of all taxable value. If the property was assessed at too high a figure it would be no ground for issuing a writ of injunction. Another remedy is provided therefor.

There is a conflict in the authorities as to whether abstract books are subject to taxation. We think the better rule is that they are subject thereto; see *Leon Loan & Abstract Co. v. Equalization Board*, 53 N. W. 94, and that

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the peculiar circumstances of this case do not except it from said rule.

Affirmed.

DUNBAR, C. J., and ANDERS, HOYT and STILES, JJ.,
concur.

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[No. 1191. Decided March 31, 1894.]

RASMUS KONNERUP, *Appellant*, v. J. C. FRANDSEN AND
ELIZABETH FRANDSEN, *Respondents*.

SPECIFIC PERFORMANCE — CONTRACT BY ONE SPOUSE FOR CONVEY-
ANCE OF COMMUNITY LAND — ESTOPPEL.

Although a contract for the sale of community land as finally committed to writing is signed by the husband alone, yet the wife is estopped to deny her interest in the contract, when it was made by her husband at her request, with her knowledge and consent as to its terms, and she has allowed the other party to the contract to perform his part of it, and has accepted the fruits of it.

Where an agreement for the sale of land, which is made at the request and with the full knowledge, acquiescence, consent and ratification of the vendor's wife, recites that the vendor named in the contract is the owner of the land, the wife is estopped from setting up any title to the land.

The fact that in an action for the specific performance of a contract to convey land the complaint contains an alternative prayer for damages in case performance can not be had, will not deprive a court of equity of jurisdiction of the action. (*Morgan v. Bell*, 8 Wash. 554, distinguished.)

Appeal from Superior Court, King County.

Winsor, Bush & Morris, for appellant.

William Martin, for respondents.

The opinion of the court was delivered by

DUNBAR, C. J. — The appellant contracted, March 14, 1890, to clear certain lands belonging to defendants, and

to receive in payment certain other lands described in the complaint. The agreement was reduced to writing, and signed by J. C. Frandsen, the husband of the co-defendant, Elizabeth Frandsen. It is conceded that the tract of land which is asked to be conveyed is community property. The prayer is for specific performance of the contract, and for damages in case the contract for any reason cannot be enforced. A demurrer was interposed to the complaint, which was overruled by the court. An answer was interposed, and upon the trial respondents objected to the introduction of plaintiff's evidence upon the following grounds:

“*First*: For the reason that plaintiff's complaint does not state facts sufficient to entitle plaintiff to a judgment in damages in case specific performance cannot be had.

“*Second*: For the reason that it appears from plaintiff's complaint that this court has no jurisdiction of plaintiff's action to render a judgment for damages, as it appears from plaintiff's complaint that a money judgment would satisfy his claim, and it would be a question for the jury to assess plaintiff's damages.

“*Third*: For the reason that plaintiff's complaint does not state facts sufficient to constitute a cause of action for specific performance of a certain contract therein set forth, or to entitle plaintiff to a decree compelling defendants to convey certain lands therein described to plaintiff.”

The court overruled the first and second objections, but sustained the third objection, and ruled that the complaint did not state facts sufficient to entitle plaintiff to a decree of specific performance compelling defendants to convey the lands in question. The objection was sustained by the court upon the theory that it appeared from the complaint that the plaintiff's action is based upon a written contract to which the wife was not a party, and that as appellant knew at the time he entered into the contract that the land was community property, he cannot now enforce the performance upon the part of the wife, and therefore he took

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nothing by such contract, and that the wife was not estopped from claiming or asserting that she had nothing whatever to do with the contract because she was not a party to it.

It seems to us that there are two reasons why the wife in this case should be estopped, if the allegations of the complaint are true, for while it is true that the agreement is set forth in the complaint, the other allegations of the complaint plainly show that the contract was actually made with both of the defendants. The second allegation recites that James C. Frandsen, in making said agreement, represented the community, and in all things wherein the community, or community interests were affected, represented both his own and the community rights and interests at the request and by and with the full knowledge, acquiescence, consent and ratification of said wife; that said agreement was made and entered into by the appellant, and by him fully performed, carried out and completed on his part by and at the instance, request and full consent of said defendant Elizabeth Frandsen, who assisted plaintiff in carrying out and performing said agreement upon his part, and in all things done thereunder by plaintiff she fully concurred, and assented and ratified every act in pursuance thereof until long after plaintiff had completed his part of said agreement, and cleared all of said land. The third paragraph recites that plaintiff, in pursuance of said agreement, fully and faithfully performed all the work therein required, and did every act upon his part to be done and performed, and, within the time required, fully complied with and completed said agreement on his part to the full satisfaction of the defendants, and thereafter, with defendants' full knowledge, consent and approval, and of each of them, entered on the said lands so to be conveyed to plaintiff by defendants, under said agreement, and took possession thereof, and slashed, cleared and other-

wise improved the same to a great extent, and at large and necessary expense and resultant increase in value thereto.

It is contended by the respondents that all the agreements between the parties were finally merged in the contract, and that, Mrs. Frandsen not being a party to that contract, she was not bound by the terms thereof. Of course the general proposition that all prior agreements between the parties were merged in the contract cannot be disputed, but the allegations of this complaint are not that the contract was any different from the contract expressed in writing, but that Mrs. Frandsen was in reality a party to the contract, and that it was executed at her request, acquiescence and consent, and, further, that she ratified said contract, and received the benefits flowing from the performance of the conditions of the contract on the part of the appellant. Not only did she agree that the contract should be made, but she went further, and continued to ratify every act done under the contract until after plaintiff had completed his part of the agreement.

We think it would be exceedingly inequitable to allow this woman, after having encouraged and consented to this contract, and after having ratified the performance of it at every step until the conditions were complied with, and after having accepted the benefits of such performance, to deny her interest in the contract. The plainest principles of justice demand that she should now be estopped from denying the contract she has in fact made and ratified.

The second reason is that the agreement itself states that the land in question is owned by James C. Frandsen, and if the allegations of the complaint are true, that this agreement was made at the request and with the full knowledge, acquiescence, consent and ratification of the wife, she should now be estopped from asserting that the land is not *owned* by Frandsen, and from denying the terms of the contract.

It is also contended by the respondents that, under the

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rule laid down by this court in *Morgan v. Bell*, 3 Wash. 554 (28 Pac. 925), inasmuch as the complaint sets forth the contract upon which their cause of action is based, and prays that provided specific performance cannot be had plaintiff be compensated in damages, the court has no jurisdiction of the case, for the reason that the only basis upon which a court of equity can take jurisdiction of an action for specific performance is that there is no adequate remedy at law. What was decided by this court in *Morgan v. Bell*, *supra*, was, that in an action for specific performance, where defendant, without any fault of his own, is legally incapacitated from performing the contract, and this fact is known to plaintiffs when they commence suit, the court has no jurisdiction of the case; and having no jurisdiction to decree performance, it can render no alternative judgment for damages. In that case it appeared that the plaintiff knew at the time of the commencement of the action that specific performance could not be enforced because the title was not in the defendant, and it was plainly an action brought in the equity court to avoid the assessment of the damages by the jury, where the equitable action must of necessity fail, and not that the damages were incident to the failure. This court in that case, after quoting § 47 of Pomeroy on Contracts, says:

“We take it that the fair corollary to this proposition would be, that where the legal remedy of damages is all that can be decreed, equity will not exercise jurisdiction, and the original proposition applies more forcibly where the fact is determined that legal damages are all that is *actually* sought; and in this case the plaintiffs must have brought their action on the theory that a compensation in damages would furnish a complete and satisfactory remedy, for they knew that no other remedy could be decreed.”

The court proceeds to say:

“Under the authorities, however, where something inequitable is shown in the transactions of the party who is

trying to avoid the specific performance, or where there are inequitable circumstances surrounding the case, courts of equity, notwithstanding they cannot decree the performance of a contract, will grant relief in damages, and whether or not such an exception to the general rule can be justified on the ground of reason, the doctrine seems to be so well established by the decisions of the courts that it cannot with safety be disregarded.”

No such principle as is discussed in *Morgan v. Bell* is involved in this case. It is true that the prayer concludes that if it shall appear that defendants had no sufficient title, and therefore cannot convey said lands, and the whole thereof, to plaintiff, and could not at the time of the commencement of this action, or, for any other cause, the first relief herein prayed for cannot be had, then that plaintiff have judgment against said defendants, and each one and both of them, for six hundred dollars damages and costs. But that cannot be construed further than as a precautionary application for relief by way of damages in case the defendants had wrongfully disposed of the title to said land after plaintiff's right to the specific performance had accrued, which under all the authorities would be a relief to which he was entitled in an action for specific performance.

Testimony should be allowed to be introduced under the allegations of the complaint and the denials of the answer and reply, and if, in the opinion of the court, the allegations of the complaint are sustained, the appellant will be entitled to a judgment as prayed for. The judgment of the court in dismissing the action will, therefore, be reversed, and the cause remanded with instructions to proceed in accordance with this opinion.

HOYT, SCOTT, ANDERS and STILES, JJ., concur.

[No. 1196. Decided March 31, 1894.]

THE STATE OF WASHINGTON, *on the relation of George H. Heilbron, Respondent*, v. J. W. VAN BROCKLIN, *Appellant*.

QUO WARRANTO—WHEN LIES—REVIEW OF ACTION OF MAYOR IN REMOVING AN OFFICER—PLEADING—NON-FEASANCE IN OFFICE—JUDGMENT FOR DAMAGES.

Although the charter of a city authorizes the mayor to remove any appointive officer for cause, after a hearing upon charges preferred which is judicial in its character, yet, under Code Proc., § 679, quo warranto, and not certiorari, is the proper action for reviewing the legality of the proceedings before the mayor.

In an action of quo warranto by a member of the board of public works of the city of Seattle, who had been removed from office by the mayor on the ground that he had violated a provision of the city charter declaring that no member of any board shall be directly or indirectly interested in any contract with the city or for its use, the charge being that the board of public works had voted to place insurance on property of the city with certain companies represented in Seattle by a corporation of which the relator was a stockholder, an answer setting up that the relator had been found to be a trustee in such corporation does not accord with the charge, and is demurrable.

When the chief executive duties of a city are confided by its charter to the board of public works, and it is given control of all public work, the water system, streets, sewers, wharves, parks, lights, city property, and street improvements and assessments, and the members are paid a salary of \$1,500 per year, payable monthly, a member of the board is guilty of non-feasance in office when he confines his services to attendance upon the meetings of the board, whose meetings are about fifteen in number per month, lasting about one hour each, and neglects to personally visit and inspect any of the public works going on under the direction of the board, some of them involving unnecessary and extravagant expenditure, on which reports are made to the council without personal knowledge on the part of such member of the character of the work. (SCOTT, J., dissents.)

In an action of quo warranto judgment for damages against the defendant is unwarranted where there is no showing that he had collected any of the salary of the office.

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15	300
8	557
28	504

Appeal from Superior Court, King County.

George Donworth, and *James B. Howe*, for appellant.

Burleigh & Gamble, for respondent.

The opinion of the court was delivered by

STILES, J. — Respondent was removed from the office of member of the board of public works of the city of Seattle, by the mayor, for cause alleged and found to be sufficient after notice and a hearing. The court below, in a proceeding by quo warranto against his successor in the office, rendered judgment in favor of respondent, ousting the successor and charging him with the salary of the office during the period of his usurpation.

The appellant filed an answer to the information in which he set up the proceedings taken by the mayor and his findings and order pursuant thereto. Respondent demurred to the sufficiency of the answer, and when the court sustained the demurrer appellant declined to plead further, whereupon judgment as above stated was entered.

The only propositions submitted by appellant which are material are two, viz.: (1) Was the course taken by respondent to test the right to the office the proper one, or should the proceeding have been certiorari to the mayor? (2) Did the facts found by the mayor constitute "cause" for removal?

1. Code Proc., § 679, expressly provides that an information may be filed against any person who shall usurp, intrude upon, or unlawfully hold or exercise any public office within this state. This information is, under the code, a plain statement of the facts (§ 681), and therein is just like a complaint upon any other cause of action; that it is to be filed upon the relation of some one is the only even formal difference between this proceeding and an ordinary civil action. For convenience and from custom

we call the proceeding quo warranto, and it is the statutory mode of testing the title to an office by the state, whether there be a contestant for the office or not, and by a contestant on his own behalf. Other methods of accomplishing the same result, where the dispute is as to the validity of an election, are found in the election laws.

It would seem, therefore, that the statute exactly covered this case. Quo warranto was employed in *People, ex rel. Metevier, v. Therrien*, 80 Mich. 187 (45 N. W. 78), and the court passed both on the question of jurisdiction and the sufficiency of the charge, although certiorari would have been an appropriate proceeding for attack on the jurisdiction. A statutory proceeding similar to that provided for here was employed in *State, ex rel. Smith, v. Anderson*, 26 Fla. 240 (8 South. 1), to determine which of two claimants was entitled to the office of alderman of the town of Daytona. The charter of the town gave the council the power to judge of the election returns and qualifications of its own members, and it was urged that the canvass of the vote, the declaration of the result, and the admission of the respondent to the office by the council was a prior adjudication which could not be set aside by quo warranto; but this objection was passed with the remark that the relator was not in any sense a party to the alleged adjudication.

But the theory of appellant here is, that because the charter of the city of Seattle authorized the mayor to remove any appointed officer for cause, and inasmuch as the proceedings for removal must be judicial in their character, the adjudication made by him cannot be inquired into and its sufficiency ascertained, as to jurisdiction or upon the merits, except by a direct proceeding for a review of the judgment, and, as no appeal is provided for, the proceeding must be certiorari.

No authority need be cited to uphold the general prop-

osition that the judgment of any tribunal, however inferior, to which the determination of a matter is committed will stand as verity until it is directly attacked, if, in the exercise of its power, it has kept within its jurisdiction. Counsel upon this point cite *People, ex rel. Hatzel, v. Hall*, 80 N. Y. 117, where quo warranto was refused for the benefit of the private relator, Hatzel, who claimed the office, but was sustained as to the people, who, it was declared, were not bound by the adjudication of the board of aldermen, although that body was, by statute, invested with the power to judge of the election returns and qualifications of its own members. In passing, it was held that the clause appended to this grant of authority, "subject, however, to the review of any court of competent jurisdiction," was nothing more than a declaration of what would have been the case without such clause. The case cited contains a very full and learned discussion of the relations of the courts to municipal corporations and inferior tribunals, much of which is applicable to the case before us. The relator was denied the benefit of the writ because, as it is said, he had himself invoked action by the board of aldermen by a petition that he be awarded a seat, because in the ensuing proceeding it had been determined that he had not, but that the respondent had, a right to the seat, and because that adjudication was unreversed and operative.

Certiorari is the universal method of trying these questions in New York; but when we come to examine the law upon which the practice is based, *People, ex rel. Clapp, v. Board of Police*, 72 N. Y. 415, is a fair specimen of the cases there, and it shows that, by some means, the evidence upon which the board acted was before the court, an unusual thing in certiorari where the record alone, with so much of the evidence as may be pertinent to the question of jurisdiction, is transmitted to the reviewing court. But there is in New York a complete code governing certiorari to

review the determination of inferior tribunals, art. 7, ch. 16, Code of Civil Procedure (1891), and at § 2140 we find the following:

“The questions, involving the merits, to be determined by the court upon the hearing, are the following only:

“4. Whether there was any competent proof of all the facts necessary to be proved in order to authorize the making of the determination.

“5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof against the existence of any of those facts, that the verdict of a jury, affirming the existence thereof, rendered in an action in the supreme court, triable by a jury, would be set aside by the court, as against the weight of evidence.”

It is needless to say that in this state we have nothing but the common law writ to depend upon, and that an examination of the merits of a case could not be had under it. In the case at bar there is neither statute, charter nor ordinance governing the proceedings to be taken by the mayor. He was left to his own devices to originate the charges, notice, manner of hearing and determination, and he has performed this part of the proceeding in such a manner that no criticism is made of it. He has, as appears by the answer, made a record sufficient as a return upon certiorari. But suppose the respondent desired to contest the materiality or sufficiency of the evidence upon which the findings were made, is it not clear that both he and the court would be estopped? And thus it would turn out that the officer would be removed (supposing the findings to be sufficiently strong) upon unsworn testimony, where there was no power on either side to summon witnesses, and, perhaps, in case the mayor should have no experience in judicial investigations, upon evidence which was wholly immaterial and irrelevant. An instance of this kind is shown in *People, ex rel. Clapp, v. Board of Police, supra*, where the removal was made upon a charge of con-

duct unbecoming an officer, and the only evidence was as to his age and some irregularities in his appointment not affecting himself.

Certiorari has been used both in contested election cases and in cases of removal from office elsewhere than in New York, but the authorities invariably hold that when there is no statute to supplement the common law writ, only the question of jurisdiction and the legality of the action of the inferior tribunal upon the record can be inquired into, except that the reviewing court will examine into the facts upon the jurisdictional question, if the jurisdiction is denied. *Election Cases*, 65 Pa. St. 20; *Donahue v. Will County*, 100 Ill. 94; *People v. San Francisco Fire Dept.*, 14 Cal. 479; *Henshaw v. Butte County*, 19 Cal. 156. And such is the general rule as to common law certiorari in all cases. Harris on Certiorari, § 45.

By this proceeding, therefore, the respondent would have no adequate remedy unless the one adopted can be upheld, and to do that it is only necessary to accept the statute in the form in which we find it and recognize an exception to the general rule that decisions of inferior tribunals are final unless directly attacked. With any other disposition of the matter there must necessarily be a failure of justice in many such cases.

2. There is a provision in the charter of the city that no member of any board shall be directly or indirectly interested in any contract with the city or for its use, and that any violation of this provision shall work a forfeiture of the office and warrant the removal of the officer. Two of the charges found to be sustained by the mayor were to the effect that the respondent, while a member of the board of public works, had voted to insure certain of the property of the city with foreign corporations of which the Washington Territory Investment Company was the local agent, and for which service the agent received a com-

pensation by commissions on the premiums paid by the city, he, respondent, then being a stockholder of the agent company, and interested in the commissions paid.

The findings upon these charges are in accordance with the allegations, except that respondent is found to be a trustee only of the Washington, etc., Company. It is urged that this must be taken as a finding that he was a stockholder, since, under the law, no one but a stockholder can be a trustee of a corporation; and that whether this be so or not is immaterial, because it is a finding of interest sufficient to meet the charter prohibition. But charges of this kind ought to be proven as made, and a variation of this gravity ought to defeat them. A stockholder would be necessarily interested in the proceeds of any contract with his company; but it might not be so with a trustee who might be holding such an office nominally, and for the mere accommodation of some friend. Any business man knows how mercantile and other private corporations are conducted in this respect. It may be said that a presumption would attach from the finding that respondent was a trustee, that he was a stockholder also, but if he was a stockholder in fact, why did not the finding respond to the charge and say so? The very fact of the variance causes a suspicion that the proofs did not warrant more than was found. It may be a question whether a mere naked trustee would come within the charter provision, although under the rules of agency a contract in the procurement of which he took part might be avoided. The court below found this part of the answer bad, and we concur in the finding.

Another branch of the charges relates to the respondent's alleged want of attention to the duties of his office. Under the charter the board of public works fills a very large place in the executive of the city. In fact, aside from the fire, police and treasury departments, it is pretty

much all there is of the executive excepting such powers of supervision as are confided to the mayor. Everything in the shape of public work, the water system, the streets, the sewers, wharves, parks, lights, city property and street improvements and assessments are within the control of this board. The board consists of three members, at a salary of \$125 a month, and it would seem that they must be very busy men. The charter requires that the board shall hold regular meetings twice each month, and special meetings at such times as it may appoint or the president may call. It has appointed three meetings each week, which usually last about one hour each. The mayor finds that the respondent has confined his services as a member of the board to attendance upon these meetings, and that he has not personally visited or inspected any of the public works going on under the direction of the board, although many that were important and expensive were being prosecuted. In some instances pointed out there was, according to the findings, incompetency in management, and unnecessary and extravagant expenditure; and reports to the council upon these and other matters were joined in by respondent without personal knowledge of them. The substance of the findings accords with the charges. But over against all that the mayor alleges, the respondent claims that by attending the appointed meetings and performing the first duty which the charter enjoins, viz., that of making rules and regulations for the government of the board and its officers and employés, he has done all that the charter requires. This position is supported by further reference to the charter which authorizes the board to appoint a superintendent of water works, a superintendent of sewers, a superintendent of buildings, bridges and wharves, a street commissioner, and a city engineer, upon whom rests the duty of inspecting and supervising the actual operations and property of the city. And it is also urged

that one member of a board of three can do nothing officially except at a meeting with the others.

But in our judgment it will not do to consider this board as if it were nothing but a formal body of in-door overseers gaining its knowledge of the city's affairs by reports from subordinates; or as if it were a legislature or a court. It is certainly constituted as if it were intended to be a working body, and one whose members would be kept well occupied during regular business hours; either in knowing what was being done by subordinates outside, or in preparing for what is to be done on the inside, or keeping informed as to the multitude of affairs committed to their charge. The salary is a fair one, payable monthly, implying that the incumbent is not engaged for job work, or upon a per diem, but that his services during business hours are to be at the command of the city, if necessary to the proper conduct of its business. What may be exactly the proper range of duties for each member of the board we cannot undertake to say, but are satisfied that the mayor was quite within the bounds when he held that the attention paid by respondent to the city's affairs did not fulfill the demands of the office under the charter.

We are, therefore, of opinion that the demurrer to the separate defense should have been overruled.

There was no showing that the appellant had collected any of the salary from the city, and therefore no judgment for damages should have been entered against him. *Merritt v. Hinton*, 55 Ark. 12 (17 S. W. 270); *People v. Nolan*, 101 N. Y. 539 (5 N. E. 446); *Bier v. Gorrell*, 30 W. Va. 95 (3 S. E. 30); *U. S., ex rel. Crawford, v. Addison*, 6 Wall. 291.

Judgment reversed, and cause remanded for further proceedings.

DUNBAR, C. J., and ANDERS and HOYT, JJ., concur.

SCOTT, J. (*dissenting*).—I dissent. No fact was found which was ground for removal. A personal inspection of the improvements under way was not required, nor was there any authority for individual supervision by any member of the board. The respondent may have taken other means to inform himself with reference to them aside from personal visits, and there was no showing that he was not well informed, and had not performed every duty enjoined upon him, as I view the record.

[No. 1221. Decided March 31, 1894.]

O. B. LITTELL, *Assignee of the claim of Littell & Smythe Manufacturing Company, Appellant*, v. P. B. M. MILLER *et al.*, *Respondents*.

FORECLOSURE OF MECHANIC'S LIEN — PERSONAL JUDGMENT AGAINST CONTRACTOR — REVERSAL OF FORECLOSURE DECREE.

An appeal from a decree of foreclosure of a mechanic's lien, which results in a reversal of the decree on account of the invalidity of the lien, will not affect the personal judgment obtained against the contractor in the foreclosure proceeding, when he has not joined in the appeal.

Appeal from Superior Court, King County.

Thomas T. Littell, for appellant.

Stratton, Lewis & Gilman, for respondents.

The opinion of the court was delivered by

HOYT, J.—The appellant, or his assignor, furnished materials for the erection of a certain building in the city of Seattle. Not having been paid therefor, an action was brought against the alleged owner of the building and the

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person to whom most of the materials had been furnished, who was alleged in the complaint to be the contractor for the erection of the building. It was also alleged in the complaint that the owner had himself procured to be furnished a small part of the materials.

Upon the trial of the action in the superior court a judgment was rendered against the defendant Deal, to whom as contractor the most of the materials were furnished, for the amount remaining unpaid thereon, and against the alleged owner for the portion of the materials furnished directly to him, and both of such amounts were adjudged to be a lien upon the building, the sale of which was ordered to satisfy such lien. From this judgment and decree the defendant, P. B. M. Miller, the alleged owner of the building, took an appeal to this court, where it was held (3 Wash. 480, 28 Pac. 1035) that the suit for foreclosure of the lien could not be maintained against him, for the reason that he was not the sole owner of the property, and it was here adjudged that the cause should be reversed and remanded for further proceedings.

When the cause was again brought to the attention of the superior court there were some questions raised and discussed before the case was called for final disposition, which are not raised upon this appeal. Upon the final consideration of the case the court came to the conclusion that the judgment against Deal had not been affected by the proceedings in the appellate court, for the reason that he had not joined in the appeal; that such judgment remained in force and was a final adjudication of the rights of the appellant growing out of the furnishing of the materials to said Deal as contractor. For that reason appellant was not allowed to introduce any proofs tending to show that there had been such a novation as to make the defendant Miller primarily liable for such materials.

If this judgment was in force there could be little doubt

of the correctness of such ruling on the part of the superior court. As a foundation for such judgment the appellant had alleged in his complaint that the materials were furnished to said Deal, and had made no suggestion of any such fact as would tend to show that any other person was primarily liable to the appellant therefor; and if the judgment entered thereon is still in force it would be such an adjudication of the rights of the parties as would preclude appellant from now showing that in fact the primary liability of said Deal had been transferred by the action of the parties to the defendant Miller, and the said Deal relieved therefrom. It is only necessary for us, therefore, to decide as to whether or not the judgment against Deal was in force at the time the cause came before the court for a second trial.

It is contended on the part of the appellant that such judgment is void, for the reason that the authority to render it in a suit to foreclose the mechanic's lien depended upon the existence of such a lien, and that when it was found that there was no lien, the jurisdiction to render a judgment against the contractor was taken away; and he cites the cases of *Hildebrandt v. Savage*, 4 Wash. 524 (30 Pac. 643), and *Eisenbeis v. Wakeman*, 3 Wash. 534 (28 Pac. 923), to sustain such contention. There are some expressions in those cases which justify their being so cited. But upon a careful consideration of the opinions, in the light of the facts before the court, it will be seen that they do not go to the extent of holding that the judgment against the contractor, under the circumstances of this case, would be absolutely void. The most that can be said to have been established by these cases is that the rendition of a judgment against the contractor in the suit to foreclose the lien, after it had been adjudged that no lien existed, would be erroneous.

In the case of *Tacoma Lumber, etc., Co. v. Wolff*, 7

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Wash. 478 (35 Pac. 115), this point was directly ruled upon by this court, and it was there held that judgments like the one under consideration were not void, but at most were only erroneous, and the ruling in that case is decisive of the question under consideration.

What was the effect upon this judgment of the appeal of defendant Miller? The appellant's contention is that at the time the appeal was taken the cause stood as a suit in equity, and that it was brought to this court for trial *de novo*, and that the judgment of reversal inured to the benefit of defendant Deal as well as defendant Miller. We are unable to agree with this contention. The statute under which the appeal was taken contains an express provision to the effect that a party not joining in an appeal shall derive no benefit therefrom except from the necessities of the case. It was not necessary in order to furnish the appellant Miller his full measure of relief that there should have been any relief furnished to the defendant Deal. The judgment against him could in no manner affect the rights of the defendant Miller so long as it was held that it was not a lien upon his property.

It follows that the judgment was not void, was not reversed upon the appeal, and was in full force and effect as against defendant Deal when the second trial of the cause was had.

Judgment affirmed.

DUNBAR, C. J., and SCOTT, J., concur.

STILES, J. (*dissenting*).—Considering the point here decided as one of first impression, I dissent on the grounds stated by me in *Tacoma Lumber, etc., Co. v. Wolff, supra*. I do not think the court in that case passed upon this question.

8	570
12	194
8	570
16	518
8	570
86	280

[No. 1088. Decided April 3, 1894.]

R. F. RADEBAUGH, *Plaintiff*, v. TACOMA AND PUYALLUP
RAILROAD COMPANY *et al.*, *Defendants*.

MASON MORTGAGE LOAN COMPANY, *Appellant*, v. J. C.
BENEDICT *et al.*, *Respondents*.

RECEIVERS—SUIT IN INTERVENTION—APPEAL—FINAL ORDER—
NOTICE—MORTGAGE OF ROLLING STOCK—POSSESSION OF RE-
CEIVER.

Where a receiver of a railroad corporation has been appointed in an action instituted for that purpose, an order, made upon a complaint in intervention by preferred creditors against a mortgagee of the property, directing the sale of the rolling stock to satisfy the claims of the preferred creditors, is an appealable order, as the title to the rolling stock is thereby absolutely determined adversely to the claim of the mortgagee.

In such a proceeding the statute requiring all parties not joining in the appeal to be served with notice is complied with by service upon the receiver, who is the representative of all the creditors, and by the joinder or notification of all parties to the proceedings in intervention.

Where an appeal is from an order incident to a receiver's suit, and is not an attack upon the order appointing a receiver, the appellate court is not authorized to inquire into the regularity of the proceedings leading up to the appointment of the receiver.

Under the laws of this state, Gen. Stat., §§1646 *et seq.*, a mortgage upon the real estate of a railroad, and purporting to cover the rolling stock also, does not bind the latter class of property, when the instrument is executed and recorded as a real estate mortgage, and does not comply with the formalities required in the execution of chattel mortgages.

The appointment of a receiver of a railroad corporation has the same effect in law as though the creditors, whom he represents, had taken possession of the rolling stock under legal proceedings, and the right of a mortgagee to take possession of the rolling stock does not give the mortgagee any priority over creditors, when its right of possession accrues subsequent to the appointment of the receiver.

Appeal from Superior Court, Pierce County.

Campbell & Powell, and *Crowley & Sullivan*, for appellant.

A. R. Titlow, and *Calkins & Shackleford*, for respondents.

The opinion of the court was delivered by

HORT, J. — Upon the application of a judgment creditor, a receiver was appointed for the Tacoma & Puyallup Railroad Company, who duly qualified and entered upon the discharge of his duties as such receiver. The appellant, the Mason Mortgage Loan Company, had a mortgage upon the railroad of said company, which, by express terms, included the rolling stock and other appurtenances belonging thereto. This was executed and recorded as a real estate mortgage, but was not executed with the formalities required by our statute to make it good as a chattel mortgage as between the mortgagee and a creditor of the mortgagor. The receiver, in reporting claims against the corporation, designated those of certain laborers as preferred, and upon a hearing at which the holders of such preferred claims and the appellant seem to have been the only active participants, the court held that a part of these claims were entitled to be paid before those of the body of the creditors, and directed the sale of the rolling stock of the railroad to provide funds for that purpose. This adjudication by the court was upon a complaint in intervention by the holders of the preferred claims and the answer of the appellant, but we are unable to see how that fact could have any weight in determining the rights of the parties, since such proceedings were all in the suit in which the receiver had been appointed. The rights of such claimants and of the appellant as to said rolling stock could as well have been determined in the regular progress of the receiver's suit without any such intervention. Prior to the making of the order from which this appeal was

prosecuted, the appellant had sought permission to wage its suit for the foreclosure of its mortgage outside of the suit in which the receiver had been appointed, and had been denied such right, but we are likewise unable to see how this fact could in any manner aid the contention of the appellant as to the ruling of the court in making the order complained of.

The respondents interpose here a motion to dismiss the appeal, for the reason that all the parties who had appeared in the receiver's suit had not joined in the appeal or been served with notice thereof, and for the further reason that the order was not such an order as would sustain an appeal. The order, by its terms, absolutely determined adversely to the claim of the appellant, the title to the rolling stock of said railroad, and was, in our opinion, a final one within the meaning of our statute as to appeals. All the parties to the proceedings in intervention were joined or notified, which was all that was necessary if it was to be taken as a special proceeding incident to, or outside of, the receiver's suit. If, however, it was a proceeding in that suit, the receiver was the representative of all the creditors to such an extent that service upon him was sufficient. The motion to dismiss must be denied.

Upon the merits of the appeal counsel for appellant have presented an elaborate brief in which they have attacked the regularity of the proceedings which led up to the appointment of the receiver, and many other of the rulings of the court in said receiver's suit. The questions thus raised and discussed are important ones, and are sufficient to show that the original proceedings for the appointment of the receiver may not have had the most solid foundation. In our opinion, however, none of these questions are open for investigation on this appeal. They could only be raised by a direct appeal from the order appointing the receiver, or from such other orders as are complained of.

This appeal, being from an order incident to the receiver's suit, and not an attack upon the order appointing such receiver, does not authorize us to do more than to determine as to the ruling of the court in making the particular order from which the appeal was taken.

The superior court held that appellant's mortgage not having been executed with the formality required was of no effect as between the mortgagee and creditors of the mortgagor so far as the rolling stock of the railroad was concerned. If it was right in so holding, the appellant was not aggrieved by the order from which it appealed. If it was wrong, it is aggrieved for the reason that under the order the property might be sold, and pass out of the jurisdiction of the court before its rights under the mortgage could be determined and enforced. In our opinion this is the only question material to this appeal. It is claimed on the part of the appellant that its mortgage, which covered the real estate belonging to the railroad company, and purported also to cover the rolling stock, was valid, and binding upon both classes of property, even although it was only executed and recorded as a real estate mortgage. The respondents claim directly the contrary, and argue that under the express provisions of our statute a mortgage of personal property is void as against creditors of the mortgagor or subsequent purchasers and incumbrancers for value, unless it is executed with certain formalities therein provided for. Our statute upon the subject is somewhat peculiar, and from the section which provides as to what property may be the subject of a mortgage, if it stood alone there would be some reason for holding that the rolling stock of a railroad company was not put upon the same basis as other kinds of personal property. The section referred to is as follows:

“SEC. 1646. Mortgages may be made upon all kinds of personal property, and upon the rolling stock of a railroad

company, and upon all kinds of machinery, and upon boats and vessels, and on growing crops, and on portable mills and such like property.”

But when the language therein used is interpreted in the light of other sections of the chapter in which the section is found, it appears that there could have been but one intent on the part of the legislature, and that was to put the rolling stock of a railroad upon the same footing as other personal property. Such being the intent of the legislature, is there anything in the nature of the property or of the transaction covering it with a mortgage which will warrant the court in setting aside such apparent intention? Counsel for appellant argue that there is, and cite the case of *Hammock v. Farmers' Loan & Trust Co.*, 105 U. S. 77, to sustain their contention. This case having been decided by the highest court in the land, and bearing evidence of careful consideration, is entitled to great weight, and if the reasoning of the court in that case could be fully applied to this one, we should be content to follow it, and sustain the contention of appellant. In our opinion, however, the reasoning therein can have but little force in determining the question now under consideration. The contention there that the mortgage which purported to cover the rolling stock was void, for the reason that it was not executed and recorded as a chattel mortgage, was founded entirely upon the provision contained in the constitution of the State of Illinois, which declared, as does our own constitution, the rolling stock of railroad companies to be personal property; and the court held that that provision in itself had not so determined the fact that such rolling stock could only be mortgaged as personal property as to prevent the legislature from providing that it might be mortgaged as a part of the franchise and real estate of the corporation, and that a statute which so provided was not void because of such constitutional provision.

In the case at bar we not only have the constitutional provision, but we have in addition thereto the statute as to chattel mortgages which, as we have seen, provides that rolling stock is personal property within the terms and for the purposes of such statute. Such being the fact, we ought not to enter upon such a discussion as did the supreme court of the United States as to the construction of the constitutional provision as affected by questions of public policy. When the legislation is such as to show clearly the intent of the legislature, the courts have no right to investigate as to whether or not public policy will be best subserved by a construction of the statute in accordance with such intention. Under the provisions of the New York statute as to mortgages of personal property, there were at least as good grounds for contending that they did not apply to mortgages of the rolling stock of a railroad as under our statute, yet it has been uniformly held in the highest court of that state that the fact of the manifest inconvenience and injustice of the application of the provisions of their statute as to chattel mortgages to such rolling stock was not sufficient to warrant the court in sustaining a mortgage upon such property not executed and recorded as provided for in the statute. See *Hoyle v. Plattsburgh & Montreal R. R. Co.*, 54 N. Y. 314; *Vilas v. Page*, 106 N. Y. 439 (13 N. E. 743).

There are cases in other states to the same effect, but the appellant having cited only the case above referred to, and that of *Dow v. Memphis & L. R. R. Co.*, 20 Fed. 260, to sustain the contrary contention, and these cases, in our opinion, not being applicable to the question presented for our decision, we do not deem it necessary to enter into a further investigation of the authorities. It follows that the mortgage of appellant could not be enforced against the rights of the respondents so far as it purported to cover the rolling stock of the railroad.

We have not lost sight of the contention on the part of the appellant, that since it would have been entitled to possession before the presentation of the claims of these laborers had not the receiver been appointed, its rights should be adjudicated as though it had actual possession of the road, including the rolling stock. We, however, think that these facts do not aid its contention on this appeal for two reasons: *First*, The appointment of the receiver, for the purposes of this appeal, must be held to have been duly authorized and to have had the same effect in law as though the creditors whom he represented had under legal proceedings taken possession of the rolling stock; *second*, the claims to which preference was given were for services rendered before the appellant was entitled under the terms of his mortgage to take possession of the property, and the holders thereof became creditors of the mortgagor before the mortgage of the rolling stock was made effectual by possession thereunder.

The order appealed from must be affirmed.

DUNBAR, C. J., and SCOTT, ANDERS and STILES, JJ.,
concur.

[No. 1074. Decided April 4, 1894.]

J. SINGER *et al.*, *Appellants*, v. JOHN WALLACE *et al.*,
Respondents.

LOGGERS' LIENS — FORECLOSURE — DESTRUCTION OF LOGS —
REMEDIES.

In an action to foreclose loggers' liens, the person who has destroyed the identity of the logs to which a right of lien attached cannot be made a party defendant for the purpose of being made to respond in damages for the injury; but the remedy of the laborers is to bring separate actions against their employers for the respective sums due them for labor, and, under Gen. Stat., § 1694, they have another right of action against the person sawing up and de-

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stroying the identity of the logs for the actual damages suffered by them.

Appeal from Superior Court, King County.

Ronald & Piles, for appellant George W. Downs.

William Martin, and *Stratton, Lewis & Gilman*, for respondents.

The opinion of the court was delivered by

STILES, J.—Appellant George W. Downs, in February, 1892, purchased from the firm of Wallace & Kennedy a lot of logs, and within thirty days thereafter a number of other parties to this action filed loggers' liens thereon. This suit was commenced to foreclose these liens, and proceeded so that in November, 1892, a judgment of foreclosure was entered in favor of certain of the claimants and against others. The principal defendants, Wallace & Kennedy, do not appeal, but such of the claimants as were defeated in their attempt to establish liens and Downs are here as appellants. Owing to the variety of facts connected with the several claims, the case would be a very intricate one were it not that one matter at the threshold must dispose of it.

It seems that at the time the lien notices were filed the logs were probably intact, in the possession of Downs, at his mill at Port Townsend, they having been towed there from Des Moines, King county, and delivered to him for full payment of the contract price in cash. But the complaint alleged that Downs "has cut said logs up into lumber and converted the same to his own use, of the value of eighteen hundred dollars, without plaintiffs' consent," and if this statement was true there was nothing to base a foreclosure upon. The prayer of the complaint was, that each plaintiff have judgment against Wallace & Kennedy for the amount due him; that he have a decree of foreclosure against the logs; and that Downs be decreed to pay the sum due, with attorney's fee, etc. This was confusing

things beyond what the statute, even as now enacted, contemplates. The logs being out of existence, plaintiffs' rights were to have separate actions at law against Wallace & Kennedy for the respective sums due them for their labor, without piling up unnecessary fees and costs upon a foreclosure which had nothing to operate upon; and as to Downs, if he had sawed up and destroyed the identity of the logs to which a right of lien attached, without the consent of the lien holder, the statute, Gen. Stat., § 1694, gave the latter a right of action for the actual damages suffered. These two rights of action had no connection with each other, and the party defendant in one had no interest in the cause of action against the other. One was based upon contract, while the other was in the nature of a tort.

The insufficiency of the complaint was raised by Downs, by demurrer, and at every stage of the trial. The judgment against Wallace & Kennedy seems to have been taken by default, and will not be disturbed by the result of Downs' appeal.

The evidence, as stipulated, supported the allegation of the complaint that Downs had sawed up the logs, and the findings of the court coincided. A judgment was entered in accordance with the prayer of the complaint, including a money judgment against Downs for the amount found due each plaintiff whose lien was sustained, with costs, attorney's fees, etc.

Upon the allegation referred to in the complaint, Downs' demurrer should have been sustained, and the action dismissed as to him. *Garneau v. Port Blakely Mill Co.*, ante, p. 467.

The judgments against Downs are reversed, and the cause remanded for dismissal as to him.

ANDERS and HOYT, JJ., concur.

SCOTT, J., concurs in the result.

DUNBAR, C. J., dissents.

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[No. 1076. Decided April 4, 1894.]

THE STATE OF WASHINGTON, *Respondent*, v. W. E. PAGGETT, *Appellant*.

NUISANCE — MAINTAINING POWDER MAGAZINE — EVIDENCE —
ABATEMENT.

Where the substance of the charge, in an information for maintaining a nuisance, is that the defendant unlawfully maintained a powder magazine in a thickly settled neighborhood, evidence is inadmissible for the purpose of showing that the explosives stored therein had been recklessly managed while being carried from vessels to the magazine, and while being loaded upon cars for transportation abroad.

Upon the prosecution of an employé of a powder company for maintaining a public nuisance, judgment upon his conviction ordering that the nuisance be abated is erroneous.

Appeal from Superior Court, Pierce County.

Parsons, Corell & Parsons, for appellant.

W. H. Snell, Prosecuting Attorney, and *Charles Bedford*, for The State.

The opinion of the court was delivered by

STILES, J.—Appellant was informed against for maintaining a public nuisance. The charging part of the information stated that appellant—

“Unlawfully and negligently kept and maintained a powder magazine at or near the locality known as ‘The Smelter,’ and within a thickly populated neighborhood, with many buildings, dwelling houses, stores and other occupied buildings within a radius of three hundred yards of said magazine, in which he [appellant] did keep and cause to be kept, negligently and unlawfully, large quantities of dynamite, nitro glycerine, giant powder, and other dangerous and highly explosive materials to the prosecuting attorney unknown, in storage and for use and sale in the exercise of his trade and employment, to the annoyance of

the neighborhood and public generally, and to the danger of the safety, health, comfort and property of the neighborhood and of the public in general, and to their injury in health, comfort and safety.”

Construing this charge we are constrained to differ somewhat with the court below upon the question of what the issues were upon the trial. Evidence was admitted over the objection of appellant tending to show that there had been a more or less reckless management of the explosives afterwards stored in the powder magazine while they were being carried from the vessels by which they were shipped from California to the magazine, and while they were being loaded upon cars and other means of transportation abroad. Other testimony went to the point of showing that the powder magazine was *per se* a nuisance, from the fact of its being located in a thickly settled neighborhood. The question is, what did the information charge.

It is true that the statement is made that appellant “unlawfully and negligently kept and maintained a powder magazine,” and that he “did keep and cause to be kept, negligently and unlawfully, large quantities of dynamite,” etc., “in storage.” There is no allegation that he negligently managed or handled or cared for the explosives, or any other matter which tended to charge a nuisance through any want of precaution in those particulars. To have properly framed an information charging a nuisance upon this ground, the facts going to constitute the negligence must have been set forth. Therefore, we view the use of the word “negligently” as being merely superfluous, and as adding nothing to the word “unlawfully,” which is found in the statute. The substance of the charge is that appellant unlawfully maintained a powder house in a thickly settled neighborhood, and that was the issue to be tried.

That the issue should be definitely one thing or the

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other appears clearly from the result in this case. Appellant was found guilty, and, in addition to the fine imposed, was ordered to abate the nuisance, to wit, "the keeping and maintaining a powder magazine . . . and the use of the same for keeping and causing to be kept large quantities of dynamite, etc., in storage therein." Now, if the conviction occurred upon the charge of maintaining the magazine at an improper place, then such an order would be pertinent and would follow the verdict of the jury. But if the jury found the alleged nuisance to exist merely in the method of handling the explosives, either while they were in transit to or from the magazine, or while they were in the building itself, the only thing to be abated would be that particular manner of transacting the business. Viewed in this light, it was error to admit any of the testimony showing the manner in which boxes of dynamite were carried to and from the magazine; that certain boxes were allowed to fall off the truck and be broken open; that the track was out of repair, etc.

It may be said upon the point just disposed of that counsel for appellant seemed, at the close of the case, to coincide with the court's treatment of the information, by requesting instructions covering the method of handling the explosives, which the court gave. But the criticism would not be just in this instance for the reason that counsel at all points in taking the testimony objected to evidence of that character and may be presumed to have presented instructions in accordance with the repeatedly asserted views of the court as to the questions to be tried.

These views necessitate a reversal of the judgment as a whole, but, in view of a re-trial, it is necessary to discuss the judgment itself a little further. Counsel for the state declared, during the progress of the trial, that the prosecution was based upon § 118 of the Penal Code. That section was first adopted in 1873, and reads as follows:

“Every person who shall erect or continue and maintain any public nuisance, to the injury of any part of the citizens of this territory, shall, upon conviction thereof, be fined in any sum not exceeding one thousand dollars.”

At that time and until 1875 there seems to have been no statutory definition of nuisances, the courts being left to the common law for the ascertainment of what constituted a public nuisance. But in the latter year another act was passed which, with the exception of its first section, now constitutes title 61 of the General Statutes. The section omitted appears as § 1235 of the Code of 1881, and is as follows:

“Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.”

Sec. 12 of the same act applies in part to buildings, and enlarges on the first section by providing that—

“The erecting, continuing or using any building or other place for the exercise of any trade, employment or manufacture which, by occasioning noxious exhalations, offensive smells, or other annoyances, becomes injurious and dangerous to the health, comfort or property of individuals or the public . . . are nuisances.”

The fourteenth section, which is now Gen. Stat., § 2895, provides that—

“Whoever is convicted of erecting, causing or contriving a public or common nuisance, as described in this title, or at common law, when the same has not been modified or repealed by statute, where no other punishment therefor is specially provided, shall be punished by a fine not exceeding one thousand dollars, and the court, with or with-

Apr. 1894.] Opinion of the Court — STILES, J.

out such fine, may order such nuisance to be abated, and issue a warrant as hereinafter provided.”

It will be observed that the punishment by fine is the same as that provided for in Penal Code, § 118; but whereas, in the Penal Code the persons mentioned are those who “erect, continue or maintain a public nuisance,” those who are mentioned in Gen. Stat., § 2895, are those who “erect, cause or contrive a public nuisance.” It was doubtless for the reason that appellant was merely an employé of the Judson Powder Company, in charge of the magazine, that this information was declared to be founded upon Penal Code, § 118. He confessedly did not erect, cause or contrive the magazine or the business conducted therein, but was merely the instrument of the corporation in maintaining it, and at the time of the trial had actually ceased to be in the employment of the Judson Powder Company for a period of several months.

The prosecution sought and obtained a construction of the law that these two statutes should be taken together, and that an order for the abatement of the nuisance could be obtained upon a conviction of an employé for maintaining a nuisance equally as upon a conviction of his principal for erecting, causing or contriving the nuisance. Upon this point it would be sufficient to say that the statute does not so provide. The only penalty laid down for maintaining a nuisance under Penal Code, § 118, is a fine. Resort may be had to the act of 1875, Gen. Stat., title 61, for a definition of what a nuisance is; but either there is no penalty at all based upon the facts which were proven against appellant, he being a mere employé, or the penalty which the statute assesses against him is the only one which can be inflicted. The reason of the case is obviously with this construction. The law contemplates that property, either in a business or in a building, shall not be destroyed unless the person who is financially interested

therein is before the court. An employé has no interest in either, and while he may be culpable in continuing to maintain an obnoxious trade or business, he has no such control over it as that an order that he abate the entire business could be otherwise than oppressive, if not in its nature necessarily ineffectual.

Counsel for the state argued that in view of such a ruling it would be impossible to secure the abatement of this particular nuisance, because the owner of the building and business is a corporation, and a foreign corporation at that. The obvious answer to that proposition is that a corporation is equally subject to indictment for maintaining a nuisance with a natural person, and that a foreign corporation doing business in this state is no less subject to its laws, criminal as well as civil, because its principal place of business happens to be in another state.

Depositions taken in California by stipulation were read at the trial on behalf of the appellant; but in view of the decision in *State v. Humason*, 5 Wash. 499 (32 Pac. 111), and of the objection made by the prosecuting attorney, they are not considered here.

It seems to be conceded that the mere existence of a powder magazine in or near a neighborhood where people live and carry on business may be *per se* a nuisance, depending upon the quantity of the explosives stored there, and the character of the explosives themselves.

Therefore, the judgment being reversed, the cause is remanded for a new trial.

ANDERS and HOYT, JJ., concur.

DUNBAR, C. J., and SCOTT, J., dissent.

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[No. 1101. Decided April 4, 1894.]

JOSEPH WINTERMUTE *et al.*, Respondents, v. WILLIAM
CARNER *et al.*, Appellants.

8	585
9	301
26*	490
37*	441
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8	585
27	216
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8	555
30	378
30	608

APPEAL—LAWS CHANGING PROCEDURE—APPLICATION TO PENDING APPEALS—SPECIFIC PERFORMANCE—EQUITABLE ACTIONS—FINDINGS OF COURT—TRIAL OF QUESTIONS OF FACT.

Where a law regulating appeals provides that it "shall govern proceedings had after it shall take effect, in actions then pending as well as those in actions thereafter begun, but shall not affect any right acquired or proceeding had prior to the time when it shall take effect," the settlement of a statement of facts on a pending appeal must be governed by the provisions of such law, although judgment had been rendered and notice of appeal given prior to the taking effect of the law.

A contract for the sale of a mill cannot be specifically enforced by the purchaser, when there is an outstanding judgment against him for the payment of one installment of the purchase price, without first requiring the payment of the judgment, and its payment subsequent to the rendition of the decree of specific performance will not avail plaintiff on appeal, if it has not been paid in compliance with such decree.

Sec. 379, Code Proc., requiring the court to make findings of fact in actions tried without a jury, has no application to causes of equitable cognizance.

In equitable causes it is discretionary with the court to submit questions of fact to the jury, or to try all the issues itself.

Appeal from Superior Court, Pierce County.

Calkins, Shackelford & Calkins, and Claypool, Haight & Crushman, for appellants.

A. R. Titlow, for respondents.

The opinion of the court was delivered by

ANDERS, J.—Judgment was entered in this cause in favor of the respondents and against the appellants, on May 29, 1893. Notice of appeal was served June 7, 1893, and thereafter and on June 27, 1893, an order was made

by the court, after notice to respondents, extending the time for filing a statement of facts to July 17, 1893, on which date the said statement was filed with the clerk of the superior court. On July 26 thereafter notice was served on respondents that appellants would apply to the judge who tried the cause, on the 2d day of August following, to settle and certify the statement of facts, at which time, over the objection of counsel for the respondents, the judge settled and certified the same. The respondents now move this court to strike the statement of facts so settled and certified from the record herein, and to affirm the judgment, mainly for the alleged reasons that the notice was not given nor the statement settled and certified within the time prescribed by law.

Counsel for the respondents proceeds upon the theory that the provisions of the Code of Procedure were applicable to the proceedings objected to, and that therefore the court had no jurisdiction in the premises at the time it settled and certified the statement, and that its action in that regard was a mere nullity; and if counsel's premise is true, his conclusions are evidently correct. But the appellants contend that the proceedings relating to the notice and settlement were in accordance with the provisions of the act of March 8, 1893, which was in effect at the times mentioned, and that the provisions of the code were not applicable thereto. We are constrained to say that, in our judgment, the contention of the appellants ought to prevail. Section 18 of the act referred to (Laws 1893, p. 118) provides that—

“This act shall govern proceedings had after it shall take effect, in actions then pending as well as those in actions thereafter begun; but it shall not affect any right acquired or proceeding had prior to the time when it shall take effect, nor restore any right or enlarge any time then already lost or expired.”

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We think it is well settled that no one has a vested right in or to any particular remedy or method of procedure. And this being so, the legislature had a right to change the law and make it applicable, as changed, to all proceedings thereafter had or taken, in any cause. And as the appellants in this instance seem to have properly proceeded under the new law, it follows that their statement of facts should not be stricken from the record. Moreover, it appears from an examination of § 13 of this act, concerning the settling and certifying of statements of facts and bills of exceptions (Laws 1893, p. 117), that it is therein provided that no irregularity or failure to pursue the steps prescribed by the act, on the part of any party, or the judge, shall affect the jurisdiction of the judge to settle or certify a proper bill of exceptions or statement of facts. That provision disposes of the question of the jurisdiction of the judge to settle and certify the statement of facts herein. The respondents' motion is denied.

Upon the merits of this appeal there are but few questions to be determined. The first one is, did the court below err in decreeing a specific performance of the contract set forth in the complaint?

The appellants insist that the respondents were not entitled to such a decree, for the reason that neither at the time of the commencement of this action nor even at the time of the trial had they performed their part of the agreement, and that performance on their part was a condition precedent to their right of action. It is a fundamental doctrine of courts of equity that neither party to a contract will be permitted to enforce it specifically against the other, until he has shown that he has done, or offered to do, or is ready and willing to do, every material act or thing required of him by the agreement at the time of commencing the action, and also that he is ready and willing to do all acts required of him in the execution of the

It is further objected that the court made no findings of fact in this cause, and that therefore its decree is invalid. But this court has repeatedly held that § 379 of the Code of Procedure, cited by appellants, has no reference or application to equitable actions. See *Bard v. Kleeb*, 1 Wash. 370 (25 Pac. 467); *Kilroy v. Mitchell*, 2 Wash. 407 (26 Pac. 865); *Enos v. Wilcox*, 3 Wash. 46 (28 Pac. 364).

Lastly, it is contended that the question of damages should have been submitted to a jury, and that the court committed error in refusing to call a jury to assess the damages in this case, at the request of the appellants. It is a sufficient answer to this objection to say that this was an equitable action brought for the purpose of obtaining an injunction (which was granted), specific performance of a contract, and damages resulting from wrongful acts of appellants, and that, in such cases, the court having jurisdiction will determine all of the issues and make a final decree granting both legal and equitable relief. Pomeroy, Eq. Jur., §§ 181, 183, 236; *Installment, etc., Loan Co. v. Wentworth*, 1 Wash. 467 (25 Pac. 298); *Kilroy v. Mitchell*, *supra*.

In equitable causes the method of determining questions of fact is discretionary with the court. It may try all the issues, or submit questions of fact to the jury, if it sees fit to do so. *Randall v. Randall*, 114 N. Y. 499 (21 N. E. 1020); *Acker v. Leland*, 109 N. Y. 5 (15 N. E. 743).

Inasmuch as the appellants have practically treated the title of the property which the respondents seek to have transferred by a decree of court as being in the respondents, by suing for a part of the purchase price thereof, and as it appears that but a comparatively small portion of the purchase price was in arrear at the time of the trial, we have concluded that we ought to consider this case as an exceptional one, and sustain the judgment: *Provided*, The respondents shall, within thirty days from the date of the

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filing of this opinion, pay to the clerk of this court for the use of the appellants the sum of \$125, together with legal interest thereon from October 3, 1892, or make satisfactory proof that the same has been heretofore paid; otherwise, the judgment and decree of the lower court will be modified by reversing all of that portion thereof awarding a specific performance of the contract mentioned and set forth in the complaint. Costs of this court to appellant.

DUNBAR, C. J., and SCOTT, HOYT and STILES, JJ.,
concur.

[No. 768. Decided April 5, 1894.]

THE STATE OF WASHINGTON, *on the relation of Laura
Wolferman*, v. SUPERIOR COURT OF SPOKANE COUNTY,
NORMAN BUCK, JAMES Z. MOORE, AND JESSE ARTHUR,
Judges thereof.

JUDGMENT OF SUPREME COURT—PROCEEDING IN LOWER COURT
TO MODIFY—GROUNDS—PROHIBITION.

A judgment will not be vacated or modified on the ground of fraud when the only basis for such allegation is the fact that plaintiff sought for and obtained a decree of foreclosure covering all the land described in the mortgage, although a certain portion of the land had been released by the mortgagee.

Where a cause has been appealed and a judgment rendered by the appellate court, no interference therewith will be tolerated on the part of the lower court by any proceeding in the cause other than such as is directed by the appellate court.

Where a proceeding is instituted in the lower court for the purpose of vacating or modifying a judgment rendered by the supreme court on appeal, the question of the jurisdiction of the lower court is involved to such an extent that the supreme court is authorized, upon an application for a writ of prohibition, to review such proceeding and prohibit it when, in fact, it would be an unwarranted interference with such judgment.

8	591
10	172
36*	443
38*	1000
8	591
16	351
16	352
8	591
25	424

Original Application for Prohibition.

Feighan, Wells & Herman, for relator.

John R. McBride, J. R. Boarman, and J. B. Metcalfe,
for respondents.

The opinion of the court was delivered by

SCOTT, J.—The relator petitions for a writ of prohibition against the superior court of Spokane county, to prevent further proceedings in an action brought by Harry C. Bell and his wife, Belle Bell, who are the real parties in interest herein, against the relator. The matters in controversy in said action have been before this court several times on various questions. 6 Wash. 84 (32 Pac. 1017); 7 Wash. 234 (34 Pac. 930); *ante*, p. 140.

Since the last proceeding above mentioned the present action was commenced in the superior court to review and so modify the decree as to except from its operation the lands claimed to have been released. The facts set up therein are substantially the same as those disclosed in the last two prior proceedings, which were brought to obtain the same relief, but as to which no hearing was reached on the merits. While fraud is claimed, its only basis is the fact that the plaintiff sought for and obtained a decree covering the whole land as described in the mortgage. Upon objection being made, the superior court determined that it had jurisdiction to entertain the action, whereupon this application is made to us to prohibit said court from proceeding therein.

The investigation of the various questions connected herewith, some of which are only indirectly pertinent, has involved an examination into a long line of authorities, many of which are cited, or are referred to, in such citations as are given. Under these we are well satisfied that the plaintiffs in said action have not stated a cause of action

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entitling them to any relief. The fraud alleged is not of that character which a court of equity would recognize as sufficient to warrant a vacation or modification of the judgment. *Hendrickson v. Hinckley*, 17 How. 443; *Embry v. Palmer*, 107 U. S. 3 (2 Sup. Ct. 25); *Gray v. Barton*, 62 Mich. 186 (28 N. W. 813); *Hayne*, New Trial and Appeal, §340; *Phillips v. Negley*, 117 U. S. 665 (6 Sup. Ct. 901); *Brooks v. O'Hara*, 8 Fed. 529; *Know Co. v. Harshman*, 133 U. S. 152 (10 Sup. Ct. 257).

The proposition that where a cause has been appealed and a judgment rendered by the appellate court no interference therewith will be tolerated on the part of the lower court by any proceeding in the cause other than such as is directed by the higher court is well sustained by the authorities. *Ex parte Dubuque & Pacific R. R.*, 1 Wall. 69; *Abrams v. Lee*, 14 Ill. 167; *Armstrong v. Poole*, 30 W. Va. 666 (5 S. E. 257). And see: *Gelston v. Codwise*, 1 John. Ch. 189; *Greene v. Greene*, 2 Gray, 361; *Elliott*, Appellate Proc., §§ 562, 576, 578-580, 585. Some of the cases hold that a proceeding like this, in the nature of a bill of review, can only be brought after obtaining permission of the appellate court. *Stafford v. Bryan*, 2 Paige Ch. 45; *Lyon v. Merritt*, 6 Paige Ch. 473; *Southard v. Russell*, 16 How. 547-570; *Ryerson v. Eldred*, 18 Mich. 491; *Kimberly v. Arms*, 40 Fed. 549.

If we were to follow these authorities, it seems as though it would follow that, where a case is presented sufficient in our judgment to warrant it, we should grant permission to a party to institute such a proceeding in the lower court, even after the lapse of the time for filing a petition for rehearing, or perhaps after the lapse of the statutory time of one year, unless such time is to govern in all cases, and upon this point the authorities are conflicting. See *Freeman on Judgments*, §§ 105, 489, 497; *Murchison v. White*, 54 Tex. 78; *Ladd v. Stevenson*, 112 N. Y. 325 (19 N. E.

842); *Yerkes v. McHenry*, 6 Dak. 5 (50 N. W. 485). Otherwise the effect would be to deprive a party from proceeding after that time. There would be no other mode provided for the investigation, for this not being a court of original jurisdiction, or constituted to try such questions, could not entertain such an action itself. But we do not find it necessary to pass upon or consider that question further at this time.

The provisions of the code (§§ 221 and 1393, Code Proc.) have a very broad scope, if they do not cover all possible grounds for obtaining relief from judgments, where the proceedings are instituted in the manner and within the time specified, and it is very questionable, at least, whether the plaintiffs have stated enough to have entitled them to any relief under any of said provisions, had they moved thereunder. They have certainly failed to do so at this late day in the action last commenced.

We are of the opinion that the jurisdiction of the lower court is involved in a case like this to the extent that we may look into the cause of action there set up, when we are applied to for a writ of prohibition, and that we should do so, as it is necessary for the due protection and enforcement of the powers vested in this court by the constitution. The remedy by appeal, owing to delay and the possibility of so having to contend with suit after suit, neither affords a party a speedy nor adequate one. See *State, ex rel. Cummings, v. Superior Court*, 5 Wash. 518 (32 Pac. 457); *Kirby v. Superior Court*, 68 Cal. 604 (10 Pac. 119); High, Extr. Leg. Rem., § 781. And should it appear from such investigation that the suit or proceeding sought to be prohibited is in fact an unwarranted interference with a judgment rendered by this court, we may and should grant the writ, and the proposition may still hold good, or at least be left an open question, that an action may be instituted in the lower court to vacate a

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judgment rendered in this court, upon sufficient grounds. So construing the law, the objection that if proceedings may be so instituted to review a final judgment rendered by this court, that litigation would in effect be interminable, and proceeding upon proceeding could be instituted, would be practically avoided, and the practice would be very similar to that of first requiring permission from this court in all cases.

We are of the opinion that this is a case where the writ should issue prohibiting further proceedings in said action, other than the dismissal thereof with costs against the plaintiffs, and it is so directed. The relator will recover her costs herein of said Harry C. Bell and Belle Bell.

DUNBAR, C. J., and HOYT, STILES and ANDERS, JJ., concur.

[No. 962. Decided April 21, 1894.]

8	595
15	500

H. A. STRONG AND E. C. WARNER, *Appellants*, v. E. ELDRIDGE AND ERASTUS BARTLETT, *Respondents*.

DEATH OF DEFENDANT PENDING ACTION — PRESENTMENT OF CLAIM TO ADMINISTRATOR — SUBSTITUTION OF ADMINISTRATOR — CONTRACT — SUBSCRIPTION — PARTIES.

Where a judgment has been rendered in a cause prior to the death of a party defendant, the jurisdiction of the appellate court to determine an appeal therefrom is not affected by the failure to present the claim upon which the action is founded to the administrator of such defendant's estate.

An order, made upon the *ex parte* application of plaintiffs, substituting an administrator as a party to the action upon the death of defendant, is not erroneous on the ground that it was made without notice to the administrator.

Although an instrument given in consideration of the location of a foundry at a certain place may recite that the maker "agrees to subscribe" a certain amount, yet where the facts surrounding the

transaction show that the instrument was delivered and received by the parties thereto as a subscription, the words "I agree to subscribe" must be construed to mean "I agree to pay." (HOYT, J., dissents.)

When a contract arises by reason of an offer or proposal by one party which is accepted and acted upon by the other, the person to whom the offer or promise is actually made may be shown by extrinsic evidence, although not named in the instrument evidencing the contract.

Appeal from Superior Court, Whatcom County.

Kerr & McCord, for appellants.

Dorr, Hadley & Hadley, for respondents.

The opinion of the court was delivered by

ANDERS, J.—This action was instituted to enforce the payment of an alleged subscription made for the purpose of securing the location of a certain foundry and machine shops at the city of Fairhaven, in this state.

The plaintiffs allege in their complaint that on or about the 16th day of September, 1890, they were the owners of and operating a foundry and machine shops in the city of Port Townsend; that for the purpose of inducing them to remove their foundry and shops to Fairhaven, the sum of five thousand dollars was offered to them by the citizens and property owners of Fairhaven and vicinity, to be paid upon the location of said foundry and machine shops in Fairhaven, when the same should be put into successful operation, equipped and furnished with all the requisite tools, implements, machinery, etc.; that plaintiffs agreed with said citizens and property holders that they would locate their foundry and shops upon such condition, and thus accepted the offer and proposition of the said property holders; that the agreement to locate said foundry and machine shops at Fairhaven upon the terms and conditions above mentioned, and not otherwise, was made known to defendants on or about September 16, 1890, at the city of

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Sehome, and that on said date the defendants were the owners of large quantities of real estate in the city of Fairhaven and vicinity, and believing, in common with other subscribers and property holders, that the location of said foundry and shops would materially enhance the value of their property, and being largely interested in the location of said foundry and machine shops, and with such knowledge, and with the desire to enhance the value of their property, they executed and delivered to the plaintiffs a certain agreement, of which the following is a copy:

“SEHOME, WASHINGTON, , 189.....

“I agree to subscribe \$1,500 towards getting the foundry at Fairhaven.

“E. ELDRIDGE, for ELDRIDGE & BARTLETT.”

That this agreement was executed by Eldridge for himself and Bartlett, whose agent he was, and was intended by the defendants to be received, and the same was received by the plaintiffs, and was, in fact, their actual completed subscription of the sum of \$1,500 to plaintiffs' enterprise, and made to appellants for the purpose of inducing them to erect their foundry and shops at Fairhaven; and the said defendants then and there delivered the said agreement or paper writing to plaintiffs, as their completed subscription to plaintiffs' enterprise, and for their use and benefit; that said agreement was, after its delivery, put down among other subscriptions delivered to plaintiffs for the same purpose, and that upon the faith of said subscriptions and agreements, this one among them, the said foundry and shops were to be located and erected at Fairhaven and not elsewhere; that subsequently and before this suit was instituted, and before a demand was made for the payment of said subscriptions, the plaintiffs, the requisite amount having been subscribed, removed said foundry and shops, and put them into successful operation, and fully carried out and performed all of their promises to

said divers persons subscribing, and to said defendants, and have ever since continued to operate and are now operating the same, as they represented to the defendants they would do when this subscription was made; and that it was solely upon the faith of said subscriptions, and this one of the defendants in particular, that the said foundry and machine shops were located at Fairhaven and not elsewhere. The plaintiffs further allege that, in removing the said shops from Port Townsend and locating the same at Fairhaven, and in procuring machinery and necessary equipments, they incurred debts, liabilities and obligations upon the faith of such subscriptions and this one in particular, which they would not have incurred had they not relied upon said subscription; that they completed said shops without any notice, knowledge or any reason to believe that the defendants intended to revoke said subscription, and that they have demanded the payments of said sum from said defendants since the completion of said work and before the commencement of this action, but that the defendants have not paid the same, nor any part thereof.

To this complaint the defendants interposed a demurrer upon the ground that it failed to state facts sufficient to constitute a cause of action; which demurrer was sustained by the court, and plaintiffs appealed.

It is disclosed by the record in this case that subsequently to the rendition of the judgment appealed from one of the defendants, Edward Eldridge, died, and Hugh Eldridge, administrator of said decedent's estate, was, upon an *ex parte* application to the court by plaintiffs, substituted as a party to this action. But it does not appear that the claim upon which this action is founded has ever been presented to said administrator or rejected by him, and for that reason it is insisted, on behalf of the respondents, that this court has no jurisdiction to determine this appeal.

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It is provided by § 986, Code Proc., that “no holder of any claim against an estate shall maintain an action thereon, unless the claim shall have been first presented to the executor or administrator.” It is contended by the respondents that this section of the statute and §§ 981 and 984 taken together conclusively show that no action can be maintained against the representative of a deceased person until the claim has first been presented to the executor or administrator and by him rejected, and that is true, because it is explicitly so stated. But in our opinion these sections only refer to cases where an executor or administrator is in existence at the time the action is commenced, for otherwise it would be impossible to first present a claim *against the estate* in the manner therein specified. There is another section of the code, however (988), which provides a method of procedure in cases where a defendant in an action dies during its pendency. It reads as follows:

“If any action be pending against the testator or intestate at the time of his death, the plaintiff shall, in like manner, present his claim to the executor or administrator for allowance or rejection, authenticated as in other cases; and no recovery shall be had in the action, unless proof be made of the presentment.”

But even this section is not applicable to the case at bar, for the reason that this action was not pending in the court where it was tried at the time of the substitution of the administrator. It had already been tried and determined. An action is pending from the time of its inception until the entry of final judgment. Black's Law Dictionary.

Counsel for the appellants suggest another reason why it was useless and unnecessary to present the claim sued upon to the administrator after his appointment and substitution as a party to the action, namely, that the court had already determined that appellants had no legal claim against

the decedent, and that therefore there was nothing to present.

It is also objected that the order of substitution was made upon the *ex parte* motion of the appellants, without notice to the administrator, and was therefore wrongful; but we think the objection is not tenable. The appellants seem to have complied with the provisions of the statute (Code Proc., § 147) in that regard, and to have conformed to the usual practice in this state, as well as elsewhere. *Stoetzell v. Fullerton*, 44 Ill. 108; *Moore v. Rand*, 1 Wis. 245; *Johnson v. Superior Court*, 60 Cal. 578.

The next question for us to determine is, did the signing and delivery of the writing in question constitute a valid and binding obligation on the part of the respondents to pay to the appellants the sum therein mentioned?

It is contended on behalf of the respondents that this instrument is not in any sense a subscription, but merely an agreement to subscribe at some future time, upon some condition or under circumstances satisfactory to the respondents, and also that it cannot be enlarged or its terms varied or changed by averments of the appellants or by oral testimony. It is evident, we think, from the paper itself, that the respondents desired the location of a particular foundry at Fairhaven, and to accomplish that object they were willing to subscribe \$1,500. Did they actually do so? If they did, they are bound; otherwise not. To subscribe, in the sense here contemplated, is to agree in writing to furnish a sum of money, or its equivalent, for a designated purpose. Anderson's Law Dictionary. If, therefore, the respondents did not agree to give this specified sum of money to the appellants for the purpose designated, then, according to the above definition, the paper before us is not a subscription and does not constitute the basis of a valid contract, and consequently the demurrer to the complaint was properly sustained. And

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whether they did so agree must be ascertained from a fair and rational interpretation of the words actually used, when viewed in the light of surrounding facts and circumstances.

While the words of a written instrument are usually to be understood in their ordinary, popular sense, unless their meaning is defined by law, or has become peculiar by reason of usage as applied to some particular subject, yet in construing an instrument, if, from the subject or from the connection or object in view, it is apparent that the parties did not so employ them, or, according to their true definitions, they will receive the meaning thus shown to have been intended. The rule is to so interpret the words as to carry into effect the intent of the parties as derivable from the whole instrument and surroundings, whether they have employed language accurately or not. Bishop, Contracts, § 404. See, also, *Atwood v. Cobb*, 16 Pick. 227 (26 Am. Dec. 658).

Moreover, "the true principle of sound ethics is to give the language of the promisor the sense in which he had reason to suppose it was understood by the promisee." Benjamin, Principles of Contracts, 111, citing: *Hoffman v. Etna Ins. Co.*, 32 N. Y. 405; *Carpenter v. Wells*, 65 Ill. 451, and other cases.

Under the present status of this case it is admitted that the instrument under consideration was delivered and received as a subscription and not merely a promise to subscribe, and that the appellants especially so considered it and incurred liabilities upon the faith of it. We are therefore constrained to hold that the words "I agree to subscribe" were intended to mean "I agree to pay."

But it is insisted by the respondents that there is no privity of contract between the appellants and the respondents, there being no payee named in the instrument. Of course it is elementary that there must be two parties to

every contract, a promisor and a promisee. But when a contract arises by reason of an offer or proposal by one party which is accepted and acted upon by the other, the person to whom the offer or promise is actually made may be shown by extrinsic evidence. *Hopkins v. Upshur*, 20 Tex. 89 (70 Am. Dec. 376); *Swain v. Hill*, 30 Mo. App. 436; *Lathrop v. Knapp*, 27 Wis. 222.

If, however, there is no promisee in existence at the time of the proposal, the promise is not enforceable in law. *Phillips Academy v. Davis*, 11 Mass. 118; *Farmington Academy v. Allen*, 14 Mass. 172; *Strasburg Railroad Co. v. Echternacht*, 21 Pa. St. 220 (60 Am. Dec. 49).

The acceptance of the proposal of the respondents by the appellants, and their incurring liabilities upon the faith of it, created a complete contract upon a consideration moving from the promisee to the promisor. *Cottage Street Church v. Kendall*, 121 Mass. 530; *Carr v. National Security Bank*, 107 Mass. 45.

Judgment reversed, and cause remanded with directions to overrule the demurrer.

DUNBAR, C. J., and STILES and SCOTT, JJ., concur.

HOYT, J. (*dissenting*).—I agree with the holding of the majority of the court that the paper writing set out in the complaint is not in itself evidence of a completed contract, but I am unable to find that it is so aided by the allegations of the complaint as to make it a basis of recovery. In my opinion what is said as to its having been delivered and accepted as a completed subscription is but a legal conclusion on the part of the pleader drawn from the fact that it was made and delivered, and that it is no such statement of fact as can in any manner aid the allegations of the paper writing. I am, therefore, of the opinion that the demurrer was rightfully sustained, and that the judgment should be affirmed.

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8	603
142	229

[No. 1069. Decided April 21, 1894.]

WILLIAM McLENNAN *et al.*, Appellants, v. J. M. GRANT
et al., Respondents.

LANDLORD AND TENANT—WHEN RELATION ESTABLISHED—DESCRIPTION OF PREMISES—ASSIGNMENT OF LEASE—UNLAWFUL DETAINER—EVIDENCE.

The relation of landlord and tenant is established where the owner of premises permits another to take possession thereof for any determinate period.

Where tenants have entered into possession of premises under a contract of lease, neither they nor their assigns can repudiate the lease because of uncertainty in the description of the premises.

Any conveyance by a lessee of his whole interest in demised premises, leaving no reversionary interest in himself, operates as an assignment regardless of the form of the instrument of transfer; and a purchaser entering under such conveyance becomes a tenant of the lessor, although he may have had no notice that his grantor had merely a leasehold interest.

In an action of unlawful detainer against the assignees of a tenant, it is prejudicial error to permit proof that plaintiffs made no claim to the premises while defendants were in possession prior to the expiration of the term.

Appeal from Superior Court, Clallam County.

Benton Embree (*John Trumbull*, of counsel), for appellants.

George C. Hatch, and *W. R. Gay*, for respondents.

The opinion of the court was delivered by

ANDERS, J.—The appellants brought this action under the unlawful detainer act to recover from the respondents possession of certain real estate situated in the city of Port Angeles, described in the complaint as follows:

“Beginning at a point on the northerly side of Front street in said city, fifty feet in a westerly direction from the intersection of the northerly side of said Front street

with the westerly side of Laurel street in said city; thence in a westerly direction along the northerly side of Front street twenty-five feet; thence at right angles in a northerly direction about two hundred feet; thence at right angles in an easterly direction twenty-five feet; thence at right angles in a southerly direction to the place of beginning, embracing all of the lands north of said Front street upon which improvements are made.”

The complaint alleges that on the 1st day of February, 1889, the plaintiffs, being in possession of the property above described, entered into a certain contract or lease with one William Smythe and one Harry Coventon, whereby they agreed to demise, lease and rent unto said Smythe and Coventon, for the term of three years from the 1st day of March, 1889, up to and including the last day of February, 1892, the above described lands and premises, said lease or contract being in the words and figures following, to wit:

“PORT ANGELES, W. T., February 1st, 1889.

“For value received in advance, we, William McLennan and Mary Ann McLennan, hereby agree to rent to William Smythe and Harry Coventon, the house on Front street next to the Colony or Tourist hotel, corner of Front and Laurel streets, Port Angeles, W. T., with entire possession of the same, and all privileges and rights pertaining thereto, from first day of March, 1889, for three years, ending last day of February, 1892, and the building to be kept in good repair. If the above place is for sale within three years from the date of entry, the above named persons, William Smythe and Harry Coventon, are to have the preference right to buy.”

This agreement was signed by appellants and Smythe and Coventon, witnessed by two witnesses, but not acknowledged. The complaint further alleges that in December, 1889, Smythe and Coventon sold and assigned all their right, title and interest, by virtue of said lease, in and to said premises, to J. A. Rex & Sons, and that, thereafter, and before the termination of the said lease, Rex & Sons

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sold and assigned all their right, title and interest therein to the respondent J. M. Grant, who thereupon entered into the possession of said premises both in person and by his sub-tenants, Harlow and Kemp, and refused to surrender such possession to the appellants after the expiration of said term. It is also alleged that Smythe and Coventon entered into the possession of said premises in accordance with the terms of said contract. The respondents answered by denying each and every of the allegations of the complaint, and upon these issues the cause was tried by a jury, resulting in a verdict and judgment for the defendants.

In support of the judgment, the respondents seem to contend that the lease was void for uncertainty of description, and, also, that there was not sufficient proof that the premises in possession of the respondents were the premises mentioned in said lease. But we are of the opinion that neither of these propositions can be sustained.

We think the testimony clearly shows that the premises mentioned in the lease are the same premises in controversy in this action. It is well settled that parol evidence is admissible to identify the subject matter of a contract, and such testimony was properly admitted in this case; and, besides, the testimony also shows that Smythe and Coventon entered into possession under their contract, and that being true they could not have repudiated the lease merely because of uncertainty in the description of the premises. Their taking possession of, and occupying and using, the premises showed that they fully understood what property was intended to be leased. *Bulkley v. Devine*, 127 Ill. 406 (20 N. E. 16). And if they are estopped, their assignees are also estopped for the same reason.

The testimony of the appellants shows that on the first day of February, 1889, and for some time prior thereto, they were in possession of certain buildings situated upon

the lot described in the complaint, such lot being a portion of the water front property in the said city of Port Angeles; that the said Smythe and Coventon proposed to appellants to lease the lot in question, and that they, Smythe and Coventon, be permitted to tear down the buildings upon the said lot, and erect another building thereon of the value of not less than five hundred dollars, and of which they, Smythe and Coventon, should have possession for the term of three years. This proposition was accepted by the appellants, and thereupon the written contract above set forth was signed by all of the said parties, and Smythe and Coventon proceeded to tear down the buildings thereon, and to erect the new building which had been agreed upon, which building, when completed, they occupied and used as a lodging house and restaurant for some months thereafter. This testimony of the appellants is substantially corroborated by both Smythe and Coventon.

The first question to determine is, whether the relation of landlord and tenant existed between the appellants and respondents at the time of the commencement of this action. Mr. Taylor, in his work on Landlord and Tenant, speaking of the facts necessary to create a tenancy, says:

“Any permissive holding is sufficient for the purpose, and may be contained in a series of letters, or in a brief memorandum of the contracting parties. And any phraseology will establish the fact from which it appears to have been the intention of one of the parties voluntarily to dispossess himself of the premises, and of the other to assume the possession, for any determinate period, whether the words made use of run in the form of a license, a covenant, or an express agreement.” Taylor, Landl. & Ten. (8th ed), §26.

It is shown by the testimony in this case that Smythe and Coventon never at any time disputed the title of the appellants to said premises. On the contrary, the witness Coventon testified that had he and Smythe continued in

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possession of the premises for the full term they would have, at the end of the three years, surrendered possession of the said building to the appellants. It is true that Smythe testified in effect that he did not enter into possession by virtue of the lease; but the reason he gave for so testifying appears to be a mere conclusion, and not the statement of a fact. It appears by the uncontradicted testimony of all the parties to the lease that Smythe and Coventon entered into the possession of the demanded premises by permission of the appellants. Smythe says that he and Coventon agreed with the appellants to take down the buildings then upon the premises, and erect a new building in lieu of rent, but that it was also agreed that appellant McLennan was to assist in such work, and that when they were proceeding with the construction of the building he refused to do so; and from that fact he seems to have concluded that he was not the tenant of the appellants. The testimony of all the parties to the contract clearly establishes the fact that Smythe and Coventon were the tenants of the appellants, or, in other words, that the relation of landlord and tenant existed between them and the appellants.

Such being the case, the next question is, are the respondents the assignees of Smythe and Coventon? In other words, do they hold the premises as their successors in interest. If they do, it is frankly conceded by the respondents that they are estopped from questioning the right of appellants to the possession of the premises in question. The respondents argue, however—or rather the respondent Grant, who is the only real respondent—that when he purchased the building in controversy of Rex & Sons, he had no actual notice that the appellants claimed to be the owners or entitled to the possession of the same. To constitute an assignee it is not necessary that the instrument of transfer should be designated as an

assignment. Any conveyance by a lessee of his whole interest in demised premises, leaving no reversionary interest in himself, operates as an assignment regardless of the form of the instrument of transfer. Taylor, Landl. & Ten. (8th ed.), § 16; *Sexton v. Chicago Storage Co.*, 129 Ill. 318 (21 N. E. 920); *Craig v. Summers*, 47 Minn. 189 (49 N. W. 742).

In this case it appears that the lessees, Smythe and Coventon, sold, transferred and set over their entire interest in the premises to Rex & Sons, and that the latter by quitclaim deed transferred all their right, title and interest to the respondent J. M. Grant, or to his wife. The respondent Grant is, therefore, an assignee of Smythe and Coventon, and as such is estopped from denying the title or right of possession of appellants. Nor would it be material in this case if the respondent had no notice of the claim of appellants to the property in controversy, and the court so instructed the jury.

In *Jackson v. Harsen*, 7 Cow. 325, the court said:

“The law seems to be well settled, that when the relation of landlord and tenant is established, it attaches to all who may succeed to the possession, through or under the tenant, either immediately or remotely.”

It is further said in the same case that, “where a tenancy exists, a purchaser who enters under an absolute conveyance in fee, from the tenant, is considered as entering as the tenant of the lessor; although he may not have known that his grantor held or derived his possession from the lessor.” See, also, Taylor, Landl. & Ten. (8th ed.), §§ 705-6; *Jackson v. Davis*, 5 Cow. 130.

From a consideration of all of the testimony in the record, we are of the opinion that the objection of appellants that the verdict was not supported by the evidence is well taken. We think the overwhelming weight of the evidence is to the effect that Smythe and Coventon were

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tenants of appellants. In fact, we find no substantial evidence to the contrary.

It is further objected by appellants that the court permitted the respondents to prove that while they were in possession of the premises prior to the expiration of the term, the appellants laid no claim to the property. This, we think, was prejudicial error. The proofs having shown that the respondent Grant was the assignee of the original lessees, appellants could not in good faith make any lawful claim to the possession of the property until the expiration of the lease. The effect of this testimony was to lead the jury to believe that because the appellants made no claim to the possession of the premises while Grant was in possession, and before the expiration of the time mentioned in the written agreement, their claim is made now in bad faith, or, in other words, is a mere afterthought.

Objections are also made to certain of the instructions to the jury. The law of the case was correctly and lucidly given to the jury in the first five instructions of the court, and if the learned judge had then defined the meaning of the word tenant, as he thereafter did, and had then stopped, there could have been no objections to the instructions whatever. The court having instructed the jury that if they found from the evidence that the relation of landlord and tenant existed between Smythe and Coventon and plaintiffs, and that the defendant Grant had possession of said premises by virtue of quitclaim conveyances, which conveyances simply conveyed the interest of said Smythe and Coventon in said premises, that the defendant Grant stood in the shoes of Smythe and Coventon and had no more or greater rights or interest than Smythe and Coventon had, regardless of the fact whether or not the defendant Grant had notice of such relation of landlord and tenant, proceeded to instruct the jury upon the question of the effect of such notice as to the rights of the respondents.

All of said instructions were unnecessary and useless, if not inconsistent with those previously given, and no doubt tended to confuse the minds of the jury. Some other objections are made to specific portions of the instructions, but we deem it unnecessary to discuss them at this time as we fail to see wherein the appellants were prejudiced thereby.

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

DUNBAR, C. J., and HOYT, SCOTT and STILES, JJ., concur.

8	610
10	574
11	158
36*	686
36*	1120
39*	98
39*	450
8	610
13	271

[No. 1248. Decided April 21, 1894.]

THE STATE OF WASHINGTON, *on the relation of A. J. Smith, v. W. T. FORREST, Commissioner of Public Lands of the State of Washington.*

TIDE LANDS—IMPROVEMENT BY ARTIFICIAL OYSTER BEDS—APPLICATION TO PURCHASE—JURISDICTION OF STATE BOARD.

The state board of land commissioners has no jurisdiction to pass upon the right of an applicant for the purchase of tide lands which he claims to have improved as an artificial oyster bed, when the hearing is not based upon a contest nor upon an appeal, but is founded upon a protest of citizens, setting up that the lands are natural oyster beds, as the commissioner of public lands is vested by law with the duty of determining what lands are subject to sale. (HOYT, J., dissents.)

The act of 1891, directing the reservation of natural oyster beds, does not require a suspension of sales of tide lands until the oyster reserves have been defined and plats filed; and where the county appraisers have neglected to note on the tide land maps that certain land is an oyster reserve, the commissioner of public lands is warranted in presuming that such land is subject to sale. (HOYT, J., dissents.)

An applicant for the purchase of tide lands, which he or his assigns had improved as an artificial oyster bed prior to the act of

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March 26, 1890, giving a right of purchase, must prove to the satisfaction of the commissioner of public lands that such land was not a natural oyster bed at time of entry thereon.

Original Application for Mandamus.

Wickersham & Reid, and *N. S. Porter*, for relator.

James A. Haight, for respondent.

The opinion of the court was delivered by

STILES, J.—The petitioner, who shows himself to be a qualified person, asks that the respondent, who is the commissioner of public lands, be required to receive \$182.16 in full payment for certain tide lands, and issue a certificate of purchase to him therefor, in accordance with the provisions of the second proviso of Gen. Stat., § 2172.

The petition shows that in 1884 petitioner took possession of two separate tracts of tide land in Totten's Inlet, Mason county, under the provisions of the territorial law to encourage the cultivation of oysters (Code of 1881, § 1189, *et seq.*), the entire area of the two tracts covering 15.18 acres; that the lands thus taken were not natural oyster beds, nor were there beds of natural oysters thereon, or any oysters at all; that he cleaned and cleared the tracts, prepared them for artificial oyster beds, brought thereon large quantities of seed oysters and so planted, cared for and cultivated them that they have become valuable as a source of oyster supply for the markets; that the tracts are within the third class of tide lands as to location; that on the 20th day of August, 1890, he requested of the state board of equalization and appeal an estimate of the cost of surveying and platting said tracts; that the estimate was made at \$60, which amount he paid to the state treasurer, March 17, 1891, with a request for a survey; whereupon the state board directed the local board of tide land appraisers to survey and appraise the tracts, which

was done March 24, 1893, and the appraisalment was returned at \$12 per acre, July 26, 1893, with a map of the surveys; that the total appraisalment was \$182.16; that a proper application to purchase the tracts was made by petitioner, and due notice of the same was given by the commissioner by publication, and proof thereof made; that no appeal has been taken from said appraisalment; that no contest has been initiated by any person claiming a prior right to any portion of the tracts; that the board of state land commissioners, on the 27th day of February, 1894, certified the absence of any such contests or appeals to the commissioner, and on the same day petitioner tendered to the commissioner the full sum of \$182.16, and demanded a certificate of purchase, which was refused; that the Mason county board of appraisers, in March, 1893, examined the said tracts and ascertained and determined that no natural oyster bed covered them or any part thereof, and that they were not necessary for the preservation or growth of any natural oyster bed; that they made no plat of any natural oyster bed in their county which covered any part of said tracts, nor did they mark or note the same upon any plat of tide lands in said county; that no appeal was taken from the determination made by said appraisers by any officer or person, and that no part of said tracts was by any public authority withdrawn or reserved from sale for a natural oyster bed, or at all.

The facts above recited would seem to be sufficient, if true, to establish the right of the petitioner to the relief asked; but there is another matter stated which the respondent maintains should defeat the application.

It appears that in December, 1893, three residents of Thurston county and one resident of Mason county filed with the board of state land commissioners a protest against the application of the petitioner to purchase his two tracts, for the reasons:

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1. That said applicant had no right or title to said lands or any part thereof, but was a mere trespasser thereon.

2. That such tide lands were not such lands as were contemplated to be sold under the provisions of the act of March 26, 1890, providing for the sale of tide lands; but were and always had been natural oyster beds, which under the laws of the state were withdrawn and reserved from sale or lease for the purpose of establishing a natural oyster bed reserve.

These protestants demanded that the application to purchase be denied, and the board, after notice to this petitioner, and over his formal objection, took testimony as to the character of the lands, and found and held them to be "covered by natural oyster beds," and to be withdrawn and reserved from sale. The respondent's refusal to accept the tender of the appraised value of the lands, and to issue a certificate of purchase, is based upon this decision of the board.

The point of attack, where the petitioner assails the action of the respondent, is the jurisdiction of the board of state land commissioners to receive and consider the protest and make a decision of the character pronounced, and the consideration of this matter obliges us to review the tide land laws to some extent.

Under the act of March 26, 1890, Gen. Stat., § 2165, any person seems to be at liberty to apply for a survey of tide lands of the third class, under the direction of the state board. When an application to purchase has been filed with the commissioner, he must deliver a copy of it to the state board, and the latter must direct the local board of county appraisers to make an appraisement. This appraisement includes an examination, classification and valuation of each parcel applied for, noting improvements, but excluding them from valuation. A plat and a record of their doings must be made in duplicate, one for

filing in the county auditor's office, and one for return to the state board. The commissioner must publish a notice of the application to purchase, and, if there are no lawful contests, it may be presumed that in due course of time he will, in some manner, obtain information of the appraisal and make the sale, though the statute leaves it entirely to the imagination to conjecture how he is to be officially informed. Perhaps now that he is a member of the state board under the act of 1893 (Laws, p. 386), there may be a way to accomplish this evidently necessary step in the proceedings.

The law provides for a "contest" within thirty days after the publication, notice of which must be filed with the state board. This contest we understand as meaning a proceeding to legally ascertain which of two claimants has the better right to purchase, but as not involving an objection to the sufficiency of the appraisal, or a mere protest of some person without interest. An appeal from the appraisal is directly provided for in §2169, but it must be taken through the prosecuting attorney; private persons have nothing to do with the matter. This appeal is to the state board, and relates to the appraisal alone. A further appeal in the matter of the appraisal is provided for from the state board to the superior court of the county where the lands are situated. By some means the authority for this last appeal was detached from §2169, where it properly belonged, and tacked, as a second proviso, to §2170. As this proviso reads, and in the connection where it occurs, it might be supposed to apply to the matter of contests; but it would be ridiculous to suppose that the prosecuting attorney would be required, upon the demand of private persons, or of any person, to interfere in the dispute between two applicants to purchase, where the state had no possible interest, while there would be some propriety in his appealing from the state board to the court

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in a matter where the appraisement was claimed to be too low.

A contest before the state board, to be commenced within thirty days after the publication by the commissioner, is provided for in §2170, and an appeal lies from the decision of the board to the superior court. In this contest which is to be waged between two rival claimants to the same land, the rights of the contestants alone are to constitute the issues. Neither the character of the land nor the correctness of the appraisement is a subject of inquiry in such proceedings. It is presumed that one or the other of the contestants will be shown to be entitled to purchase, unless it might appear that neither is a qualified person. This theory of the law would, we think, be the natural and undoubted conclusion were it not for a few words in that part of the section which provides for an appeal to the superior court. An appeal is authorized upon "questions of law, fact, or priority of right to purchase," which means, simply, upon the merits of the case between the contestants. But the appeal clause concludes with a most embarrassing *non sequitur*, thus:

"Which appeal shall bring before the court the question whether the appraisal represents the actual value of the land; and the matter shall be submitted to a jury and tried as other appeal cases are tried, and the jury shall reappraise the lands, with right to appeal, as in other cases."

Now, as has been observed, the method pointed out by the statute for raising the appraisement is by the appeal of the prosecuting attorney as the representative of the state; and the method of determining the rights of opposing claimants is by a contest. No method is provided by which an applicant can have the appraisement reduced. Is it to be supposed, then, that, upon an appeal to the superior court, either contestant may propose to raise or lower the appraisement? Must the state submit to a re-

duction in a proceeding to which it is not a party; and will either contestant be likely to attempt to show that the appraisal which fixes the amount he must pay is not high enough? Suppose the prosecuting attorney had appealed from the appraisal and carried the matter to the superior court, would the same court be called upon to again appraise in a contest appeal? Manifestly such a crossing of purposes could not have been intended, and it must be held that the quoted clauses can have no application to a contest appeal, though they may reasonably have application to an appeal by the prosecuting attorney.

We have gone into this review for the purpose of ascertaining, if possible, the relative positions of the commissioner and the state board under this law, as it stood before the act of 1893 creating the board. The first section of the act of 1890 declared that the tide and shore lands of the state should be disposed of by the commissioner. The same law provided for local appraisers and a board of equalization and appeal, to each of whom certain specific duties were assigned. Strange to say, although the commissioner was the disposing officer, not a single record concerning tide lands was directed to be deposited with him, and no provision was made for communication between him and the board, except that the commissioner must furnish the board a copy of each application to purchase, and where no appeal has been taken from the decision of the board upon a contest, it must certify its findings to the commissioner. Having, under the statute, nothing to do with the disposition of lands, the board was without jurisdiction to interfere with the matter of determining what lands should or should not be sold. The determination of such matters necessarily lay with the commissioner alone, once a survey and appraisal had been made and the record was clear of contests and appeals. The board bore relations to the commissioner

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similar to those of a surveyor general to the land officers under the United States land system, except in the two instances of appeals and the matter of appraisements. Nothing was said about supervision, but, necessarily, such supervision as pertained to sales was vested in the commissioner rather than the board.

But it is here urged that the new act creating the board of state land commissioners (Laws 1893, p. 386), has changed all this by certain language therein used. Sec. 5 declares—

“That the said board of state land commissioners shall have full *supervision and control*, under the law, of all . . . tide lands, . . . and the said board shall, from the date of its assumption of official duties, possess and exercise over all such lands and areas all the authority, power and functions, and shall perform all the duties which the . . . state board of equalization and appeal for the appraisal of tide and shore lands had and exercised, and which by law heretofore devolved upon and were the functions which they [it] performed.”

This court passed upon this same provision in *State, ex rel. Morse, v. Forrest*, 7 Wash. 54 (33 Pac. 1079), and it was there said:

“Under any known rule of construction of statutes, the conclusion is irresistible that the legislature did not intend to merge the local appraisers into the land commission, or in any manner interfere with their functions or powers.”

It was also observed that the act of 1893 makes little or no further reference to tide lands, and that the whole code of law therein enacted, with slight exception, applied only to other lands. That decision would seem to close the controversy as to whether the commissioner is still vested with the same authority and charged with the same duties as were specified in the act of 1890. Whatever of supervision or control over tide lands is not necessary to the commissioner under his authority to “dispose” of

them may be considered as vested in the board, but he must determine what lands are subject to sale, and a protest directed to the board and decided by it is no justification for his refusal to proceed with an application to purchase, since the board had no jurisdiction of the matter involved in the protest.

Another objection made in argument to the relief asked is, that the petition does not show that the county board of appraisers have complied with Gen. Stat., §2178, requiring them to investigate and plat all natural oyster beds in their county, and that the lands applied for were not within any reservation thus created. This law, which was passed in 1891, seems to be accompanied by the incompleteness which characterized its predecessor of 1890. The local boards are required to proceed at once, upon the taking effect of the act, without the intervention of the state board. They must investigate and determine the location of the natural oyster beds in their counties, and make a plat of the lands covered by, and necessary to the preservation and growth thereof, and the plat is to be "noted" on the tide and shore land plats of the county, and the lands thus platted are specifically reserved from sale and lease. Their decision is to be open for appeal and review, but to whom or by whom is not declared unless the next clause explains. "This *act* shall be open to all appeals and supervisions provided now by law under the act entitled 'An act for the appraising and disposing of the tide and shore lands belonging to the State of Washington'" (the general act of 1890), is the explanatory provision. But the only appeal from the board of appraisers lay with the prosecuting attorney, and the only supervision exercisable by the state board, except through the medium of an appeal, referred alone to technicalities of the plat and the sufficiency of the report accompanying it. The petition avers that these lands have never been in-

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cluded in any such plat, although there were duly appointed appraisers in Mason county, who examined these particular lands and determined them not to be such lands as they were required to reserve. If the contrary is true, the commissioner can so answer in this proceeding and thus end it. It may be that there are tide lands which the statute was intended to reserve in Mason county, and that the appraisers have not performed their duty under the law; but we do not find it required that if there are no such lands there they shall, nevertheless, make a certificate of that fact, and that until they have so certified no application for the sale of tide lands can be acted upon. The act of 1891 did not direct a suspension of sales of tide lands until the oyster reserves were defined and plats filed, and we think, after this lapse of time, it ought to be presumed by the commissioner that if there were such lands as ought to be reserved in Mason county they would have been noted on the tide land maps, and that lands not so noted are subject to sale.

Again, under the law, § 2166, the local appraisers, when they are directed by the state board to make an appraisal, are required to examine, survey and appraise the lands, classifying the same, noting the improvements thereon, and by whom claimed. Their return goes to the state board, which can require it to be made sufficiently full and explicit as to the facts so that the commissioner can determine therefrom whether the sale ought to be made. Such an appraisal is alleged to have been made in this case, and a return thereof filed with the state board, which, on October 7, 1893, transmitted to the commissioner a certificate thereof designating the lands described as artificial oyster beds. Oyster planters are classed as improvers of tide lands in the act of 1890, and if it be true that the petitioner, in 1884, cleared off the tracts he claims, and planted and cultivated oysters thereon

continuously until 1890, when they were of the value and importance which he alleges they were, by reason of his labor, it is difficult to see how he could fail to be entitled to purchase them under the law. If in 1884 he entered upon tide lands and by his efforts and skill in planting and cultivating oysters there, produced what, upon the passage of the act of 1890, was substantially an artificial bed, although there may have been natural oysters upon the lands before he entered, we think the same reasonable liberality should be extended to him as it is the evident policy of the law to extend to other improvers of tide lands; that is, he should be allowed to have the benefit of his labor and expense at the appraised value of the bare land, it being the intention of the reservation act not to affect such lands, but those only whereon natural oyster beds were to be found at or after its passage.

Possibly, in view of the act of 1891, the determination of the local appraisers could have been reviewed on appeal taken by the prosecuting attorney; and it is also possible that if these lands are, in fact, covered by natural oyster beds, and the determination made by the appraisers was brought about by any fraud on the part of the petitioner, or any mistake of law on the part of the officers of the state, the state will not be estopped, in a proper action, to set aside the commissioner's certificate and annul the sale. But we are satisfied that, as the proceedings stand, the commissioner should not now hesitate to accept the petitioner's tender and issue the certificate of purchase.

The alternative writ prayed for will therefore issue.

DUNBAR, C. J., and ANDERS and SCOTT, JJ., concur.

HORT, J. (*dissenting*).—I think that the intent of the legislature to protect natural oyster beds from private appropriation is so manifest that a construction of the statute which will accomplish that end should be adopted by the

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courts, if the language will warrant it, and that the language used warrants the construction contended for by the respondent. Construing all of the provisions in relation thereto together, it seems to me that it was the intent of the legislature that there should be a determination by the local board of appraisers of the facts in regard to the existence or non-existence of natural oyster beds on the tide lands before such lands should be open to purchase by reason of the cultivation of oysters thereon; that this determination should be in one proceeding as to all the tide lands of a county, so that all those who are interested in the preservation of natural oyster beds could take notice thereof, and appeal from the action of the board if they thought it was not such as the facts warranted; that such legislation would not warrant such board of appraisers in leaving this question open until an application was made for some particular piece of the tide lands, and then determine as to that piece alone the facts which they were required to certify under the statute. It will follow that, in my opinion, the entire proceeding on the part of the petitioner for the acquisition of title to the lands in question was premature, and that the commissioner of public lands for this reason alone properly refused to consummate the sale.

I am also of the opinion that the public interest will be best subserved by holding that in the state board of land commissioners has been reposed final authority as to the tide lands of the state except as their action is specially made the subject of appeal. And in my opinion it sufficiently appears from the statute that the legislature so intended. To it is given general supervision of these lands under the law, in addition to the authority theretofore vested in the boards of which it was to be the successor, and to my mind the legislation fully warrants the court in holding that it is made the duty of this board to

supervise the action of all the officers who, under the statute, have anything to do with the care or disposal of tide lands, and excepting as specially provided by statute, to finally determine all questions arising in connection with the administration of the laws in regard thereto. In my opinion the writ should be denied.

OPINION ON RETURN TO ALTERNATIVE WRIT.

STILES, J.—To the alternative writ issued in this proceeding the respondent files his answer, in which he makes a material affirmative defense, viz.: That petitioner has at no time proved, or tendered proof before him, that he, or some person or corporation under whom he claims, did, prior to March 26, 1890, plant oysters upon ground not covered with a natural oyster bed.

In considering this case upon the petition, the attention of the court was directed almost wholly to the alleged fact that the commissioner was refusing to proceed with petitioner's application on the ground that the board of land commissioners had made a decision which was binding upon him. The fact that there was no showing that any proof had been made before the commissioner himself was not alleged in the petition. Under the act to encourage the cultivation of oysters, passed in 1877 (Code 1881, p. 216), the license granted was for the planting of oysters in any bay or arm of the sea where there were no natural beds of oysters. In the act of 1890, authorizing the purchase of lands covered by artificial oyster beds, the same language was used, and it is clear that, before any person is entitled to receive a certificate of purchase, he must make satisfactory proof to the commissioner of the facts showing his right to purchase. The petitioner in this case seems to have rested upon the idea that his sworn application was sufficient, in the absence of any contest, to authorize proceedings in mandamus against the commissioner, but it is

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evident that such a construction should not be followed. Wherever the law requires certain facts to exist as a condition precedent to the right to compel an executive officer to perform a statutory duty, it behooves the person who seeks to compel the officer to act to show that he has, by his own action, put the officer in a position where the ministerial act ought to follow as matter of law. So, in this case, it was the duty of the petitioner to make proof in such reasonable way as the officer might direct, of such facts as ought to satisfy the officer of the petitioner's right to purchase. It may be that the course of proceedings taken by the land commission may have misled the petitioner up to this time, but he has lost no rights in the premises, and will lose none, since he can still make his proofs under the regulations made, or to be made, by the commissioner, and if the facts are found by that officer to be as he alleges, the acceptance of his money and the issuance of a certificate of purchase will naturally follow.

The law has entrusted the commissioner with the duty and power of determining the facts in each application presented to him, and directed him, upon the proof of those facts, to proceed in a certain way. With the determination of the facts the courts will not interfere, but should he make an erroneous application of the law to the facts it will then be time enough for judicial interference.

The petitioner will be allowed ten days from the filing of this decision to reply to the allegation of the respondent that no proofs of the petitioner's right to purchase the lands described have been made to him, and if the reply contains a denial of that allegation, the cause will be further heard upon the issue thus made; but should no reply be filed raising such issue, the writ will be discharged.

HOYT, SCOTT and ANDERS, JJ., concur.

DUNBAR, C. J., dissents.

[No. 839. Decided April 23, 1894.]

JOHN B. AULT, *Respondent*, v. A. A. BLACKMAN *et al.*,
Respondents, AND STEARNS MANUFACTURING COMPANY,
Appellant.

MORTGAGES—FORECLOSURE—DEFENSES—ESTOPPEL TO DISPUTE
VALIDITY OF PRIOR MORTGAGE.

In an action to foreclose a mortgage, an answer alleging non-delivery by the mortgagor and want of consideration for the execution of the mortgage states good defenses.

The bare recital in a mortgage that it is subject to a prior mortgage will not estop the mortgagee from questioning the consideration or validity of such prior mortgage, when the mortgagor is assailing it on the same grounds.

Appeal from Superior Court, Snohomish County.

Arthur, Lindsay & King, for appellant.

W. R. Andrews, for respondent Ault; *Ronald & Piles*, for respondents Blackman.

The opinion of the court was delivered by

ANDERS, J.—John B. Ault and D. S. Swerdfiger, co-partners under the name of J. B. Ault & Co., instituted this action against A. A. Blackman, H. Blackman and E. Blackman, and their respective wives, to foreclose a mortgage upon certain real estate in Snohomish county, executed by the above named defendants to plaintiffs, to secure an indebtedness of \$18,634.76. Some twenty other parties claiming an interest in the premises were made defendants in the action, among whom was the appellant corporation. The complaint alleged that the lien of the plaintiff's was prior and superior to the liens of all other claimants, asked the court to so adjudge, and prayed that the mortgaged premises be sold and the proceeds applied to the payment of the sum due on plaintiff's said

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mortgage. All of the defendants appeared in the action. The Stearns Manufacturing Co. filed a cross complaint against the defendants Blackman Bros., alleging that they had made, executed and delivered to it a note for the sum of \$20,500, and, to secure the payment of said note, had made, executed and delivered to it a mortgage upon the land so mortgaged to Ault & Co., and that the same was prior to the Ault mortgage. This was denied by the Blackmans, and several affirmative defenses were interposed against the alleged claim of appellant. Upon the conclusion of the testimony on the part of Ault & Co. they moved the court for leave to withdraw the name of Swerdfiger as one of the plaintiffs, and continue the action in the name of J. B. Ault, doing business as J. B. Ault & Co., which motion was granted by the court.

It appears that the alleged mortgage to the appellant was executed on August 6, 1890, and that, on the same day, Blackman Bros. and their wives made the mortgage to J. B. Ault & Co. to foreclose which this action was brought, and in which is contained the following recital:

“This mortgage is subject to one mortgage of even date for the sum of thirty-two thousand dollars, made to Stearns Manufacturing Company and others.”

Upon the trial the court admitted testimony on the part of the plaintiff and Blackman Bros., over the objection of the appellant, to show that the appellant's mortgage was without consideration, and, also, that it was never delivered to, or accepted by, the appellant. The trial court gave judgment in favor of the plaintiff, in accordance with the prayer of the complaint, and held the mortgage to the Stearns Manufacturing Co. and others void, and decreed its cancellation. From this judgment the Stearns Manufacturing Co. appeals to this court, and as grounds for its reversal relies upon the following propositions of law: *First*, That the respondent is estopped to deny the prior-

ity or validity of the mortgage to Stearns Manufacturing Co. and others; *second*, Blackman Bros. are estopped to deny the execution and delivery of the mortgage to appellant and others.

We will first consider the second proposition, and it must be borne in mind that the appellant, by its cross complaint, sought to foreclose the alleged mortgage to it by Blackman Bros., as well as to have the same declared a lien prior to that of the respondent. The defendants Blackman Bros., as a defense, pleaded want of consideration for the mortgage, and also that the alleged mortgage was void because it had never been delivered to, or accepted by, the appellant.

It is a familiar doctrine that a deed, in order to become effectual, must be delivered by the grantor and accepted by the grantee. It only takes effect upon delivery, and so long as it remains in the possession of the grantor, or under his absolute control, it is, as to the grantee named therein, no deed at all. That in an action to foreclose a mortgage a plea of non-delivery by the mortgagor, or non-acceptance by the mortgagee, is a good defense to the action, we think does not admit of doubt. No case is cited to the contrary by the appellant, and we believe none can be found. Indeed, a denial of the execution and delivery of the mortgage in such cases is classed by the courts and text writers as one of the general defenses to the action. Boone, Mortgages, § 181; 5 Wait's Practice, p. 203; 2 Jones, Mortgages, § 1479. An allegation of want of consideration, usury, or the statute of limitations, or an allegation of payment, or that the debt is payable upon an event which has not happened, states a good defense. 2 Jones, Mortgages, *supra*. Such being the law, it follows that the second point is not well taken.

In support of its first proposition, the appellant has cited a considerable number of authorities which announce the

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general doctrine that a grantee in a deed, which by its terms is subject to a prior mortgage, is estopped from questioning the consideration for, or validity of, that mortgage. The leading case upon this question in New York, and which has been often elsewhere referred to with approval, is *Freeman v. Auld*, 44 N. Y. 50. In that case the broad rule was laid down that, "the purchaser taking title subject to it (the prior mortgage) is estopped from questioning its validity, and must pay it if he has agreed to; and if not, he must allow the lands conveyed subject to it, to be applied to its payment." It appeared as a fact in that case, however, that the purchaser not only accepted the deed which by its terms was subject to the mortgage, but that the amount of the mortgage was deducted from the purchase price of the land, and the same was true with regard to subsequent transfers of the premises. It would, therefore, have been eminently unjust if, under such circumstances, the purchaser had been permitted to contest the validity of the mortgage after having recognized and considered it as a part of the price agreed to be paid for the land so purchased. A denial of the validity of the mortgage would have operated as a fraud upon his grantor, and he was, therefore, properly held to be estopped by his own admission from perpetrating a palpable wrong. From the language quoted from the opinion in this New York case, and from that used in other cases cited by the learned counsel for the appellant, it might be inferred that in no event will one who has received a conveyance of property subject to a mortgage be permitted to question the consideration or validity of the mortgage; but such, we think, is not, and ought not to be, the universal rule. A party should not be estopped by a statement in a deed unless it appears that there was an intention that the statement should not be questioned, or that injustice would follow if

the court were to allow it to be contradicted. Bigelow, Estoppel (5th ed.), 382.

Accordingly, in a late and well considered case, the supreme court of Missouri, speaking of estoppels by deed, said:

“We think it well settled that where the incumbrance is not made a part of the consideration, and not deducted from it, and where it is not assumed by the grantee, the recital in a deed that the conveyance is subject to an incumbrance does not estop the grantee from showing that what purports to be an incumbrance is not one in fact because of its invalidity, or because it has been satisfied.” *Brooks v. Owen*, 112 Mo. 251 (19 S. W. 725).

The court cites a large number of cases in support of the doctrine thus enunciated, and if the law is correctly stated in the opinion in that case, and we think it is, we are unable to perceive any reason why the same principle should not apply to the case of a mortgagee where his mortgage contains a bare recital that it is subject to a prior mortgage. Even where the general rule contended for by appellant is recognized, a subsequent mortgagee of chattels is not precluded from showing that the prior mortgage has been paid, or that the property described was never subject to the mortgage, or that the supposed prior mortgage was absolutely void. *Jones, Chattel Mortgages*, § 488; *Barry v. Bennett*, 7 Metc. (Mass.) 359.

In the case at bar the respondent, as we have seen, received a mortgage simply reciting that it was subject to a certain other mortgage of the same date in favor of the appellant. If it was a fact that no such mortgage ever existed, was the respondent estopped from showing it in a case where the mortgagor was himself denying its existence and validity? We think not. On the contrary we are of the opinion that, under the circumstances, the respondent had a right to interpose any objection to the mortgage

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that the mortgagor was interposing. *Flanders v. Doyle*, 16 Ill. App. 508.

The case at bar is distinguishable from the cases of *Clapp v. Halliday*, 48 Ark. 258 (2 S.W. 853), and *Muncie National Bank v. Brown*, 112 Ind. 474 (14 N. E. 358), cited by the appellant. In the first of those cases the subsequent mortgagee accepted a mortgage not only reciting a prior one, but expressly stipulating and providing for its payment, and the court very properly held that he was estopped to deny that which he had expressly agreed was the truth. In the second, it was held that the subsequent mortgagee would not be permitted to assail a prior mortgage on the ground that it was made to defraud creditors. That decision is evidently correct in principle, for in such a case the mortgagor himself would be estopped to assert that he had executed a mortgage for such a purpose.

Owing to the peculiar condition of the record in this case, and the probability that the same condition will not again arise, we have purposely refrained from deciding the several points raised by the motion to dismiss the appeal, though we are rather inclined to the view that some of them are not without merit.

The judgment is affirmed.

DUNBAR, C. J., and STILES and HOYT, JJ., concur.

SCOTT, J. (*dissenting*).—I dissent. I think the proof shows a consideration and delivery, and that appellant had a valid mortgage.

[No. 1039. Decided April 24, 1894.]

SEATTLE NATIONAL BANK, *Respondent*, v. FRANK MEERWALDT, *Appellant*.

PLEADING—ANSWER—NEGATIVE PREGNANT—DENIAL UPON INFORMATION AND BELIEF—REFLEVIN—DEMAND—PARTIES—JUDGMENT.

In an action of replevin to recover possession of a city warrant which plaintiff alleges came into its hands by endorsement, an answer alleging "that whether said warrant came into the hands of plaintiff as alleged, this defendant has no knowledge or information sufficient to form a belief, and he therefore denies the same," is an insufficient denial, for the reason that it constitutes a negative pregnant.

Where the complaint in such action alleges that plaintiff "forwarded and delivered unto the bank of Port Angeles into the hands of one B. F. Schwartz, the then manager of said bank, the said warrant with the following endorsement thereon, to wit: 'For collection and credit account of Seattle National Bank, Seattle, Wash.; signed, Robert G. Hooker, cashier,'" a denial of such allegations on information and belief is sufficient, although defendant is in possession of the warrant and could have had actual knowledge of the endorsement, as the material allegation of the complaint goes to the fact of the forwarding and delivery of the warrant, and not to that of its endorsement.

Although a paragraph of the complaint may allege several distinct matters, an answer thereto constitutes a sufficient denial when it alleges "that whether the matters and things set forth [in said paragraph] are true or false, defendant has no knowledge or information sufficient whereof to form a belief, and he therefore denies the same."

A paragraph of answer denying the allegations of a specific paragraph of the complaint is sufficient to raise an issue without being addressed to the allegations contained in other portions of the complaint, although having a direct bearing on the subject matter of the issue presented.

Where the defendant in an action of replevin has set himself up as the owner of the chattel in controversy, the necessity of demand upon him prior to the institution of the action is excused.

In an action of replevin the one in possession of the chattel claimed is the only necessary defendant, although an interest therein may be asserted by others.

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The judgment in favor of plaintiff in an action of replevin should be for the possession of the personal property in controversy, or in case delivery cannot be had, for the value, with damages, for the detention.

Appeal from Superior Court, Clallam County.

Action by the Seattle National Bank against Frank Meerwaldt to recover the possession of a certain warrant issued by the city of Port Angeles for the sum of \$500, to one E. C. Burlingame, which, by various assignments and endorsements, came into the possession of plaintiff, and was transferred by it to one B. F. Schwartz for collection and credit, but was afterward sold by Schwartz to the defendant, without any authority it is claimed. Judgment was rendered for plaintiff upon the pleadings, in the following terms: "That the plaintiff have and recover from the defendant the possession of the certain warrant mentioned and described in the pleadings in this cause, and that the same be immediately delivered by the defendant unto the plaintiff, and for judgment against the defendant in and for the sum of \$500, together with interest thereon in the sum of \$87.50, making a total sum of \$587.50, the value of said warrant, if this judgment for the delivery of the same be not complied with." From this judgment defendant appeals.

Trumbull & Trumbull, and W. Clark, for appellant.

Carr & Preston, C. S. Preston, and Benton Embree, for respondent.

The opinion of the court was delivered by

STILES, J. — The respondent in its complaint alleged the issuance of a certain warrant by the city of Port Angeles, directing the treasurer of that city to pay to E. C. Burlingame or bearer the sum of \$500. Subsequent portions of the complaint were as follows:

"3. That thereafter by several assignments and endorse-

ments written on the back of the said warrant above set forth, the said warrant came into the possession of this plaintiff for presentation to and collection of the amount due thereon from the said city of Port Angeles.”

Appellant answered:

“That whether said warrant came into the hands of plaintiff as alleged in paragraph No. 3, this defendant has no knowledge or information sufficient whereof to form a belief, and he therefore denies the same.”

This denial was insufficient to raise an issue, constituting as it did a negative pregnant. It is an admission that the warrant came into the hands of respondent in some manner for the purposes alleged. Bliss, Code Pl., § 332.

The fourth paragraph of the complaint is as follows:

“That thereafter, the plaintiff desiring to have presented and collected the said warrant as aforesaid, forwarded and delivered unto the bank of Port Angeles into the hands of one B. F. Schwartz, the then manager of said bank, the said warrant with the following indorsement thereon, to wit: ‘For collection and credit, account of Seattle National Bank, Seattle, Wash. Signed: ROBERT G. HOOKER, *Cashier*,’”

The answer to this paragraph was:

“That whether the matters and things set forth in paragraph No. 4 in plaintiff’s complaint are true or false defendant has no knowledge or information sufficient whereof to form a belief, and he therefore denies the same.”

It is contended that this paragraph of the answer did not constitute a general or specific denial of each allegation of the complaint, and it was probably by following the construction contended for by the respondent that the court reached its conclusion in the case. Other allegations in the complaint and the admission of the answer showed that at the time the action was commenced the warrant was in the possession of the appellant, and the contention of the respondent is, that, inasmuch as the paragraph of the complaint under discussion alleged several distinct matters,

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the denial, to be good, must have been addressed to each of the allegations of that paragraph; and further, that, inasmuch as it was alleged that certain words had been endorsed upon the warrant by the cashier of the respondent, which limited the authority of Schwartz and the bank of Port Angeles, whether or not these words were endorsed thereon must have been within the knowledge of the possessor of the warrant, and therefore could not be denied by him for want of information and belief merely.

As to the first point, we think the denial of the answer was sufficient. A fair illustration of a defective denial of this kind is found in *Collins v. North Side Pub. Co.*, 20 N. Y. Supp. 892, where the answer, after admitting a single allegation of the complaint, continued with a statement that the pleader had no knowledge or information sufficient to form a belief as to *all* the other allegations of the complaint and therefore denied the same. It was agreed that this was an insufficient denial because it might have been true that the pleader's information did not extend to all of the other allegations of the complaint, and still he might have either knowledge or information as to all but one of the allegations. But here it seems to us that the reference to the "matters and things set forth in paragraph No. 4," without the use of the word "all," ought to be taken as a sufficient denial of each and every of such matters and things.

As to the endorsement, "For collection and credit account of Seattle National Bank," etc., it is to be noted that the complaint does not allege that the plaintiff endorsed these words upon the warrant, but that it "forwarded and delivered the warrant to the bank of Port Angeles, with the following endorsement thereon;" and the denial goes to the fact of the forwarding and delivery merely. But if it be taken that the allegation is sufficient to cover the fact of endorsement by the respondent, still it would not neces-

sarily follow that when the warrant came into the hands of the appellant the endorsement was still there. The complaint did not allege that when Schwartz delivered the warrant to appellant any such endorsement was upon it; or that appellant took the warrant with any notice that any such endorsement had ever been upon it, nor that he had any knowledge that the respondent had any interest in or claim to the warrant or its proceeds. Respondent urges that, it being alleged that the endorsement was at one time upon the warrant, it must be presumed that it continued there, because otherwise some fraud would have to be presumed in order to suppose its removal; but, going further into the realm of speculation, it may be said also that it would not be presumed that Schwartz had parted with the warrant to appellant under such circumstances as would make his act in so doing a fraud.

It seems to us that the fair effect of this denial and others contained in the answer was to put the plaintiff upon its proof of such facts as would entitle it to claim a return of the warrant by appellant under all circumstances, because respondent had never ceased to be rightfully entitled to the possession of it.

Paragraph 5 of the complaint alleged that "prior to the commencement of this action the said B. F. Schwartz, without authority so to do, and without possessing any right, title or interest in and to said warrant, turned over and delivered the same to the said defendant above named." The paragraph of the answer corresponding to this one of the complaint admits the delivery of the warrant by Schwartz to appellant, but denies his want of authority so to do. We think this denial also raised an issue, although respondent claims that because facts showing the extent of the authority of Schwartz were contained in other portions of the complaint, and because the paragraph of the answer under consideration is not addressed to those facts, the de-

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nial is insufficient. It certainly cannot be a good basis for criticism of a paragraph of an answer which is directed to a specific paragraph of a complaint that it does not cover all the other allegations of the complaint, containing a statement of facts which, if undenied, would upon a trial be necessarily taken as admitted. The other allegations of the complaint spoken of all refer to the delivery of the warrant at a time prior thereto. No date is mentioned when the delivery to Schwartz occurred, but between the date of the warrant, August 7, 1891, and the time of the commencement of the action in November, 1892, there was abundant time within which the entire relation of Schwartz to the warrant might have been changed.

Appellant also complains because his denial of the demand alleged to have been made upon him was not considered; but of that he cannot complain, for the reason that it appears by his own admission that he has set himself up to be the owner of the warrant, which absolved the respondent from the necessity of making a demand. *Cobbey, Replevin*, §§ 448, 452, 512.

The material matters set out in the affirmative defense of the answer would seem to have been admissible under the denials of the answer, and, therefore, the defense was unnecessary. That another individual was interested in the purchase of the warrant from Schwartz did not make that individual a necessary party to this action. The respondent being in possession of the warrant and this being an action of replevin, he alone was the necessary defendant. *Scott v. McGraw*, 3 Wash. 675 (29 Pac. 260).

The judgment entered was in bad form, for the reason that it seemed to authorize the successful party to issue execution against the defendant unless the warrant was forthwith delivered. A judgment in such cases should be for the recovery of the personal property the possession of which was sued for, or in case delivery cannot be had, for

the value, with damages for the detention. Code Proc., § 438. The judgment did not describe the warrant, and, therefore, was deficient. But all these matters can be corrected in case a new trial results in another judgment for respondent.

The practice adopted in this case of granting a judgment on the pleadings upon an oral motion, at the time the case was set for trial, is not to be commended. It has been recognized by this court in several cases, in one of which, *Port v. Parfit*, 4 Wash. 369 (30 Pac. 328), the proper theory of such proceedings is stated, but the portion of the statute there alluded to (Code Proc., § 412) expressly provides for a five days' notice of the time and place of application to the court for the relief demanded in the complaint, where the defendant has appeared. No such notice was given in this case, and in view of the other matters controlling the disposition of the case we only speak of it because it must undoubtedly operate to the surprise of a party who has filed an answer which has been replied to, to have an oral motion of this kind presented at the time when the case is called for trial on the pleadings, which he has until then supposed to be unexceptionable. A motion of this kind is in the nature of a demurrer to the sufficiency of the answer, but when sustained it cuts off the opportunity which a party would otherwise have to amend a pleading wherein a mere technicality may have the effect of depriving him of valuable rights and substantial justice.

The judgment is reversed, and the cause remanded for trial upon the pleadings.

DUNBAR, C. J., and HOYT, ANDERS and SCOTT, JJ., concur.

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[No. 1129. Decided April 24, 1894.]

JOHN CAPECCI, *Plaintiff*, v. PETER ALLADIO, *Respondent*,
AND ROMANO QUAGLIOTTI AND LUCIA C. QUAGLIOTTI,
Appellants.

PARTNERSHIP — DISSOLUTION — RECEIVER — REDUCTION OF PART-
NERSHIP ASSETS — FRAUD — LEASE OF PREMISES BY ONE PART-
NER.

When a receiver has been appointed in a suit for the dissolution of a partnership, one partner cannot subsequently, by means of a cross complaint, bring in other parties with whom it is alleged that his partner has fraudulently conspired to procure a lease of the premises upon which the partnership business was being conducted.

The proper practice in such a case would be for the receiver to institute the proceeding necessary for reducing the contract of lease to his possession for the benefit of the partnership.

Although one partner cannot, where partnership affairs are unsettled, acquire a lease of property which has been used in conducting the business of the partnership, yet the fact that the father-in-law and mother-in-law of one partner, with knowledge of a prospective dissolution of the firm, contract for a lease of the premises at the close of the current lease, will not make them accountable therefor to the partnership, when there is no showing that the contract was made through them in the interest of the son-in-law, and for the purpose of circumventing his partner.

Appeal from Superior Court, King County.

Burke, Shepard & Woods, and *Ronald & Piles*, for appellants.

Elder & Hardin, for respondent Alladio.

The opinion of the court was delivered by

STILES, J. — John Capecci and Peter Alladio were partners in the business of keeping a restaurant, in the spring of 1893. Their business was conducted in a building leased from one Sanderson, in which building the partners

had placed several thousand dollars' worth of improvements and furnishings, together with a stock of wines and liquors. Their partnership was terminable at the will of either. From some cause not clearly disclosed, they became unable to agree, and about the month of April each was so much dissatisfied with the continuance of the partnership that he was making threats of a dissolution by the interference of the court. This state of things culminated on the 27th day of May, when Capecci, by formal notice to Alladio, terminated the partnership. In June this action was brought to have a receiver appointed to wind up the business and dispose of the partnership property.

The lease of the building in which the business was carried on had been made some years before, was a lease for one year, and had been several times renewed. Under the present renewal it would terminate December 15, 1893. It contained no covenant for any renewal beyond that date. A receiver was appointed, and he took charge of all of the partnership property, and continued to conduct the restaurant business pending the further order of the court for a final disposition of the property. Subsequent to his assuming control, the respondent Alladio discovered that the appellants Quagliotti, who were the parents of Capecci's wife, had in April procured from Sanderson a contract for a three years' lease of the building in which the partnership business of Capecci and Alladio had been carried on, the lease to be executed, and the term to commence, on December 15th following, or as soon thereafter as possession could be obtained of the premises. Upon this information Alladio obtained leave of the court to make Quagliotti and wife parties to the action instituted by Capecci, and thereupon filed what is termed an answer and cross complaint, the answer purporting to reach the allegations of Capecci's complaint, but not in any sufficient manner denying them, and the cross complaint being di-

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rected to the contract for lease obtained by the Quagliottis from Sanderson.

The allegations of this cross complaint were to the effect that Capecci and the Quagliottis had conspired to defraud Alladio by obtaining a contract for a lease in the name of the Quagliottis, but for the sole use and benefit of Capecci, their purpose and intent being that Capecci should by his action, and through the receivership, compel a sale of the property, good will and leasehold of the partnership at a sacrifice, and then himself resume the business and continue its conduct for his own benefit under the new lease, the assumed fraud upon Alladio consisting in Capecci's being put in a position where, he being the lessee of the building for a long term of years, he would be practically the only person who could afford to buy the permanent improvements and furnishings of the house, and still the sale would be for an inadequate price. The result of this proceeding was that the court adjudged the contract for a lease to have been in fraud of the partnership, and ordered that the receiver take possession of it and sell it as a part of the partnership assets. From this judgment the Quagliottis appealed.

The first ground upon which error is alleged is based upon the want of power in the court to bring the appellants into the dissolution proceeding by cross complaint in the manner pursued by the respondent.

It seems impossible to reconcile the course taken by the court in this matter with good practice. The partnership of Capecci and Alladio had been dissolved, and its assets and all its affairs were in the hands of the receiver, who alone was authorized under the well known rules governing the powers and duties of receivers to reduce to possession any and all property belonging to the partnership of which he was the representative designated by the court. There would seem to be no greater reason why Alladio,

under this condition of affairs, should have been allowed to maintain an action to reduce to the possession of the receiver this contract of lease than there would have been for his proceeding against a debtor of the partnership for the recovery of a debt due. Again, the contract for lease ran to Quagliotti and wife only, there being nothing whatever upon the face of it to show that Capecci was interested in or was to be benefited by it in any degree. If in fact it had been procured in such a manner that Capecci was really the beneficiary, the right of action would at once have accrued to the partnership, and not having been discovered until after the receiver had been appointed, that officer could have obtained substantially the same result as that reached by an independent suit brought for that purpose. The Quagliottis had no interest whatever in the matter before the court in the suit of Capecci against Alladio, and they could not consistently with any reasonable procedure be brought into it as parties thereto. If Alladio had information which led him to believe that the contract ought to be turned over to the receiver he could have put the facts in the possession of the receiver, and requested him to take the necessary steps. If he refused, a proper application to the court would have caused it to order the receiver to proceed, and if he still refused, another receiver could have been appointed who would have obeyed the mandate. Upon this ground alone the cross complaint of Alladio should have been dismissed at the threshold of the case, upon the demurrer of the appellants.

But the merits of the case are before us, and it will serve no good purpose, in the view of them which we take, to merely dismiss the cross complaint. Whether or not the Quagliottis and Capecci had conspired in the manner alleged in the cross complaint it is impossible to say, but it is very clear that these allegations were not substantiated by any sufficient proofs. What appears from the record is

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that Romano Quagliotti merely did what any other person not a member of the involved firm might have done, viz., he took advantage of the quarrels of Capecci and Alladio, which were known to himself and the owner of the building, and which appeared almost certain to result in a dissolution and breaking up of the restaurant business, and in season applied for and obtained a contract for a lease of the building after the firm lease should expire. That he was the father-in-law of Capecci, and took some interest in the settlement of his affairs with Alladio also appears, and it may also be said that the general atmosphere of the case makes it seem probable that if the effects of the partnership should be exposed to sale, and if he or Capecci should become their purchaser, Capecci might be found going on with the business at the old stand; but this suggestion, even if it can be said to amount to a suspicion, is not sustained by any evidence in the case. All that appears is that Quagliotti and wife own the contract for a lease without any obligation upon them to give Capecci the slightest benefit of it. They may do so; in fact, they have a perfect right, if they see fit, to give him the lease and pay the rent themselves, and still Alladio would have no cause of complaint so far as anything in the case has been proved.

It is a matter of law, conceded by both sides, that so long as partnership affairs are unsettled one partner cannot acquire a lease of property which has been used in conducting the business of the partnership without being held accountable to the partnership, and it may be that this could not be done in conjunction with a third party. But where the third party acts independently in obtaining the lease, or, as in this case, the contract for a lease, nothing short of clear and convincing proof that the apparently independent action of the third party is really being used as a cover for a fraudulent partner and for his benefit, can

sustain a claim that the lease should be applied to the benefit of the partnership. Any outsider had a perfect right to step in and obtain a right to the possession of the Sanderson building at the close of the current lease, without liability to the firm of Capecci & Alladio, or to either individual, concerning the same, unless upon proof of fraudulently intending to circumvent one partner to the advantage of the other. But an intention to buy the partnership assets if they should be exposed to sale, and give one partner the benefit of the lease and the purchase would not be a fraudulent circumvention, as neither would the donation of the lease alone in case the donee should be the purchaser of the assets. And to still further remove the case from one where relief of this kind can be granted, no sale of the assets has taken place, no purchase has been made, and it is mere conjecture that Quagliotti will in any wise favor his son-in-law; and even if all this had happened, and Capecci had come into possession of the building and the fixtures and furnishings, that fact alone would not of itself show that Alladio had suffered any wrong.

Reversed, and remanded for dismissal.

DUNBAR, C. J., and HOYT and ANDERS, JJ., concur.

SCOTT, J., dissents.

8	642
8	660
36*	698
36*	700
8	642
10	298
36*	698
36*	1117
8	642
30	151
8	642
41	219

[No. 1073. Decided May 1, 1894.]

ANNIE J. EDSON, *Respondent*, v. ROBERT KNOX, *Appellant*.

CONVEYANCES—DESCRIPTION—CONSTRUCTION—INSUFFICIENT
DEED CONSTRUED AS CONTRACT.

Where the description in a conveyance of land can be made certain by reversing the courses from a point referred to in the third call as the southwest corner of the tract to be conveyed and the southeast corner of an adjoining tract, and a consideration of the

May, 1894.] Opinion of the Court—DUNBAR, C. J.

description as a whole indicates that such common corner is intended as a controlling point, the deed should be so construed.

Although a deed to lands is not sealed and acknowledged as required by statute, such instrument is sufficient to pass the equitable title of the grantor and those holding under him, and can be maintained as a contract for a deed.

Appeal from Superior Court, Whatcom County.

Bruce & Brown, for appellant.

Black & Leaming, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J. — This is an action brought by respondent to recover the possession of certain real estate situate in Whatcom county. The land in dispute was originally included within the donation land claim of one Russell V. Peabody, now deceased. The respondent claims as an heir of the said Russell V. Peabody, and as grantee of the other heirs of said Peabody. The defenses of the appellant were: (1) A general denial. (2) A title in himself deraigned through Russell V. Peabody by mesne conveyance. (3) An equitable counterclaim alleging ownership and possession, and praying that his title be quieted.

A reply was interposed to the affirmative matter in the answer, and the cause was tried by the court without a jury.

With the construction which we give to the deed from Russell V. Peabody to John E. Peabody, dated January 4, 1858, under which appellant claims title, it is not necessary to enter into an investigation of respondent's title, or of the alleged outstanding titles against this land, for if the description in that deed embraces the *locus in quo*, the respondent cannot recover. The descriptive part of the deed is as follows:

“Commencing at a stone on the beach on the east corner of the bay about three hundred yards south of the mill,

thence running north two hundred and ten rods to a stake and blaze on a tree, thence west eighty-four rods to a stake and blaze fir tree, thence south one hundred and seventy-six rods to a stake forming H. Roeder's S. W. corner on the beach and six rods from the mouth of the little stream Squalicum on my place due west forming my southwest corner, thence along the meanderings of the beach in an easterly direction to the place of beginning, so as to contain seventy-four and $\frac{1}{8}\frac{5}{8}\frac{2}{6}$ acres."

This case was evidently tried with great care and marked ability by the attorneys on both sides, and evidently at no inconsiderable expense, and this court has entered upon an investigation of the points involved much more exhaustively than the length of this opinion might indicate; but, so far as the construction of this deed is concerned, we have been unable, from a careful investigation of all the authorities cited by counsel on both sides and all others that were available, to obtain much light. They all announce the common and well understood rules that monuments control courses and distances, and that natural monuments are to be given greater consideration than artificial monuments, and many other similar propositions. But these principles, it seems to us, are not applicable to the terms used in the deed in question, and we are, therefore, left to an unaided, common sense construction of the meaning of the instrument. It is true that one natural monument is referred to, viz., the mouth of the little stream Squalicum, but this deed was executed before the corners of the donation claims were established, and it seems to us from a consideration of the whole description that the central idea was that the southeast corner of Roeder's donation claim (mistakenly called the southwest corner) was identical with the grantor's southwest corner, and that it was that common point which was the controlling point, wherever it should be established, and taking that point which is the third call, and reversing the courses,

May, 1894.] Opinion of the Court—DUNBAR, C. J.

the deed is made consistent with the theory that the southwest corner of Peabody's claim and the southeast corner of Roeder's claim were intended to be identical, and the true starting point. *Ellinwood v. Stancliff*, 42 Fed. 316.

A deed the description in which commences at a stake and starts at the southwest corner of the premises intended to be conveyed, it being the northeast corner of the land that D. W. deeded to J. W. May 20, 1815, can only be construed as intending to describe and convey land the southwest corner of which is identical with the northeast corner of the tract referred to therein. *Bailey v. White*, 41 N. H. 337.

It is true in this case the beginning point is not at the southeast corner of Roeder's donation claim, but it detracts nothing from the importance of that point that it is made the third call instead of the first. Had not the southeast corner of Roeder's donation claim been regarded as of some importance it would not have been necessary to have mentioned it at all, but the land would naturally have been described as so many rods north from the place of beginning, thence so many rods west, thence so many rods south, and thence along the meanderings of the beach in an easterly direction to the place of beginning.

As was said in *Sumner, Adm'r, v. Williams*, 8 Mass. 174:

"A strict, literal and grammatical construction of an instrument, in its various parts, taken separately, would sometimes be absurd, sometimes contradictory, and frequently unjust, because against the manifest intention of the parties. But a liberal consideration is to be had of the whole instrument, in relation to the subject matter, to discover what was the true intention of the parties."

And construing the descriptions in this deed together, it seems plain to us that it was the intention of the grantor to convey the land in dispute. On the other hand, if the deed should be so uncertain as to call for extrinsic testi-

mony to ascertain its meaning, the testimony is conclusive in our minds that it was the intention of Russell V. Peabody to convey land adjoining Roeder's claim.

This land was afterward, to wit, on the 26th day of July, 1858, conveyed to William Bausman and William H. Watson by virtue of a power of attorney from John Peabody, and was afterward legally conveyed to appellant. This deed was regular in all respects excepting that it had neither been acknowledged nor recorded. At the time of its execution the statute prescribed that a deed should be in writing, signed and sealed by the party to be bound thereby, witnessed by two witnesses, and acknowledged, and it is urged by respondent that by reason of the absence of these statutory requirements nothing was conveyed. But, even if the purported deed cannot be maintained as a deed, it certainly can be maintained as a contract for a deed, and as the equitable title was conveyed to the grantee, and he took possession under the contract, the grantor, and those holding under him, will now be estopped from asserting his legal title.

It follows, therefore, that in any event the respondent must fail in this case, as under subd. 3, §195 of the Code of Procedure, the defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both, and as appellant has pleaded his equitable right to the land in controversy, and as in our judgment he has all the equities and could compel a title, having proven the deed and taken possession under it, the judgment will be reversed and a new judgment entered here in favor of defendant, appellant here, for costs both in the court below and in this court, and further decreeing that the respondent, Annie J. Edson, has no interest in the property described in the complaint, to wit, lot seven, in block thirty, in the town of Whatcom, now a part of the

May, 1894.] Opinion of the Court—SCOTT, J.

city of New Whatcom, State of Washington, and that the title of appellant Robert Knox to said real estate above described is confirmed and quieted.

STILES, ANDERS, HOYT and SCOTT, JJ., concur.

[No. 1080. Decided May 1, 1894.]

WHITMAN AGRICULTURAL COMPANY, *Respondent*, v. H. B. STRAND, *Appellant*.

8	647
28	448

CONTRACTS OF FOREIGN CORPORATION — VALIDITY — SALE —
RESCISSION.

A contract with a foreign corporation cannot be repudiated on the ground that such corporation has not complied with the law relative to foreign corporations doing business in this state.

An order for goods cannot be rescinded on the ground that it is an executory contract, when the sale has been consummated by delivery to the carrier for shipment prior to the receipt of a countermand by mail.

Appeal from Superior Court, Whatcom County.

Fairchild & Rawson, for appellant.

Black & Leaming, for respondent.

The opinion of the court was delivered by

SCOTT, J.—Appellant ordered certain machinery of respondent to be shipped from St. Louis, Missouri. The respondent was a foreign corporation, and had taken no steps to comply with the law relating to foreign corporations doing business in this state. Appellant wrote to respondent countermanding said order, but the letter was not received until after the goods were shipped. This action was brought by respondent to collect the purchase price

for said machinery, and judgment was rendered in its favor.

Appellant contends that the contract was void by reason of the facts stated, and, if otherwise, that he had a right to rescind the same on the ground that the contract was still an executory one.

We have heretofore held, in *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67 (31 Pac. 327), that such contracts are not void, and the last point is not well taken, for the sale was consummated by delivery to the carrier. The countermand was ineffectual until received by respondent, and the mail was the agent of appellant. Benjamin, Sales (ed. 1888), § 181; 5 Lawson, Rights & Rem., § 2233.

Affirmed.

DUNBAR, C. J., and ANDERS, HOYT and STILES, JJ.,
concur.

[No. 1121. Decided May 1, 1894.]

JACOB MICHAELS, *Respondent*, v. JOHN KEANE *et al.*, *Appellants*.

CONVEYANCE OF LANDS IN PARCELS—LIABILITY FOR EXISTING
LIENS.

Where the owner of a lot subject to a street assessment has conveyed away one-third of the lot by warranty deed, and subsequently conveys the balance of the lot by deed of general warranty except as to street assessments and taxes, the subsequent grantee takes with notice of the equities existing in favor of the first grantee, and he cannot pay the assessment and enforce the collection of one-third of the sum from the grantee holding under the first conveyance.

Appeal from Superior Court, King County.

Thompson, Edsen & Humphries, and *Wiley & Bostwick*,
for appellants.

D. D. Harger, for respondent.

May, 1894.] Opinion of the Court—SCOTT, J.

The opinion of the court was delivered by

SCOTT, J.—One Treen was the owner of lot two, block fifteen, East Park Addition to Seattle, and while he was the owner thereof said lot became subject to a street assessment of \$205.62. He thereafter conveyed one-third of said lot by warranty deed to one Andrus, who thereafter conveyed the same by warranty deed to one Anna Gill, and she conveyed the same by like deed to appellant John Keane. Thereafter said Treen conveyed the remaining two-thirds of said lot to the respondent Michaels by deed of general warranty excepting as to street assessments and taxes. Appellant Welch holds a mortgage executed by appellants Keane and wife upon said one-third first conveyed. The respondent paid the whole of the street assessment, and brought this action to compel appellants to pay one-third of said amount. A demurrer was interposed to the complaint which the court overruled; whereupon an answer was filed and trial had, and judgment was rendered in favor of the respondent, from which an appeal was taken.

Appellants contend that the action would not lie as the obligation rested upon Treen to pay the whole of said assessment, and Michaels having obtained the remaining two-thirds by subsequent deed stood in the same position, and could claim no greater rights than Treen had therein.

We are of the opinion that this point is well taken. Treen having conveyed one-third of said lot and warranted it free from incumbrances was under obligation to discharge the assessment lien thereon, and Michaels having taken a subsequent deed for the remaining two-thirds with notice of the equities existing in favor of appellants is in the same position. As between the parties the liability for said assessment rested upon the two-thirds of said lot last conveyed. This proposition seems to be sustained by the

weight of authority in this country. 2 Jones, Mortgages, §§ 1090–1092, 1620–1632.

Reversed.

DUNBAR, C. J., and HOYT, STILES and ANDERS, JJ.,
concur.

8 650
12 159

[No. 1142. Decided May 2, 1894.]

JOHN CAMPBELL, *Appellant*, v. PERRY D. VINCENT AND
FREMONT MILLING COMPANY, *Respondents*.

LOGS AND LOGGING — RIGHT OF LIEN — RELEASE.

Where laborers engaged in getting out saw logs have expressly released all right of lien upon the logs cut within thirty days of the time of filing liens, the right to lien upon logs cut prior thereto is thereby lost.

Appeal from Superior Court, King County.

G. D. Farnell (*Winsor, Bush & Morris*, of counsel),
for appellant.

Wiley & Bostwick, for respondent Fremont Milling
Company.

The opinion of the court was delivered by

SCOTT, J. — Appellant, for himself and as assignee of a number of co-lienors, commenced this action to foreclose fourteen liens for labor performed in getting out saw logs. Said labor was performed for one Vincent, who was engaged in the logging business in King county. While Vincent was so engaged he made several sales of quantities of logs to the Fremont Milling Company. The last sale was made on the 11th day of April, 1892. On the 16th day of said month, appellant and all of his assignors notified said company that they claimed the right to file liens

May, 1894.] Opinion of the Court—SCOTT, J.

upon these logs purchased from Vincent on the 11th of April aforesaid, for labor performed thereon. Whereupon, with the consent of Vincent, an agreement was entered into between said company and said claimants whereby the company paid the sum of \$818, the purchase price of the logs, to said claimants, which was received by them and applied in payment of the labor performed upon the said logs last sold as aforesaid, and whereupon said claimants expressly released all right to file any lien upon said logs. Subsequently said claimants filed liens upon other logs gotten out by them for Vincent which had been sold to said Fremont Milling Company prior to said April 11th. More than thirty days had elapsed since said claimants had performed any labor on the logs upon which they sought to enforce said lien claims, at the time they filed their notices of lien. Judgment was rendered for the defendants, and the plaintiff appealed.

It is contended by the respondents that in order to maintain the liens it was necessary for the claimants to have performed labor upon some of the logs against which they sought to enforce their liens within thirty days of the time when the lien notices were filed, and that as the proof shows they had expressly released all right to any liens upon all the logs on which they had performed any labor within said thirty days they could not claim or enforce any liens against the logs cut prior thereto. We are of the opinion that this point is well taken. No right was reserved in the release given to file any liens upon other logs previously sold by Vincent to the company, nor was any intimation given of any intention to claim such a lien at the time said release of the last lot purchased was obtained.

Affirmed.

DUNBAR, C. J., and HOYT, ANDERS and STILES, JJ.,
concur.

[No. 1178. Decided May 2, 1894.]

A. E. MCEACHERN, *Appellant*, v. WILLIAM BRACKETT
et al., *Respondents*.

JUDGMENT WITHOUT SERVICE—SETTING ASIDE—UNAUTHORIZED
 APPEARANCE OF ATTORNEY—APPEAL—ERRORS NOT RAISED
 BELOW.

Where a mortgagor has not been served with summons in a suit to foreclose his mortgage, an action on his part to set aside the decree of sale rendered in the foreclosure suit cannot be defeated on the ground of laches from the fact that he had neglected for five years to pay the mortgage debt and during the same period had not paid taxes on the land nor exercised any acts of ownership over it, though residing in a neighboring county and possessing the ability to pay.

Where a judgment has been rendered against a party not served with process, but in whose behalf an unauthorized attorney had appeared and pleaded, the judgment will be set aside as a nullity, although innocent third parties may suffer, when the application for relief is made promptly upon the discovery of the existence of the judgment, and when the proof that the attorney did not have authority to appear is clear and convincing.

When no exception is taken in the trial court to the affidavit of sureties upon an appeal bond, the defect is thereby waived, and cannot be raised in the supreme court.

Appeal from Superior Court, King County.

Pratt & White, for appellant.

Blaine & De Vries, and *Smith & Littell*, for respondents.

The opinion of the court was delivered by

STILES, J.—Appellant, in 1883, bought from respondent Brackett a parcel of land in King county, at the price of \$650, of which sum \$300 was paid by note secured by mortgage, and the balance in cash. The note and mortgage were transferred twice, so that respondent Brautigam was the holder thereof in August, 1884, and respondents

8 652
 9 546
 9 557
 36* 690
 38* 143
 38* 147
 8 653
 12 564
 12 568
 8 652
 15 399
 16 199
 8 652
 22 443
 8 652
 33 88
 33 121
 8 652
 42 538

May, 1894.] Opinion of the Court—STILES, J.

Phinney and Leary were endorser for value and accommodation endorser, respectively. At the date last mentioned, which was after the maturity of the note, Brautigam commenced a foreclosure action, making appellant and the other respondents above named defendants. All of the defendants in that action, except the appellant here, were served with the summons personally. The sheriff returned that appellant could not be found in his (King) county, and no further attempt to make service upon him was made. September 8, 1884, certain qualified attorneys filed a general demurrer for "the defendants," which bears upon its face the words, "Overruled, GREENE, J.," without date. On the 15th of September, Brackett filed an answer by a different attorney, and on December 20th following the default of the other three defendants was entered for want of an answer. After a reference a decree of foreclosure was entered, and in due course the property was sold by the sheriff to Brautigam for \$300, which left a deficiency of \$173.89, which Phinney and Leary paid. After receiving his deed Brautigam conveyed the property to respondent Nicholai.

Appellant, in November, 1890, brought this action to set aside the decree of foreclosure and avoid the subsequent conveyances, on the ground that he never had any knowledge of the foreclosure proceedings, or of any of the steps taken in consequence thereof, and that the filing of the demurrer by attorneys assuming to represent the defendants was without his knowledge or authority. The complaint made tender of a sum of money in payment of the mortgage debt, which sum was deposited with the clerk, and the sufficiency of the amount whereof is not attacked. The court below found all the facts to be substantially as alleged in the complaint, and particularly that the filing of the demurrer was without any authority from appellant. These findings the respondents criticize; but

we think they are fully sustained both by the direct testimony and the surrounding circumstances, and shall not disturb them. The ninth finding was against appellant, and as it was probably the basis of the court's action, we quote it in full as far as it applies, viz. :

"9. That from the time when said note and mortgage became due, to wit, the 6th day of May, 1884, until about a month before the commencement of this present suit, to wit, May 15, 1889, the plaintiff herein, said A. E. McEachern, paid no attention whatsoever to said property, nor did he make any inquiries as to what, if anything, had been done with said note and mortgage, and that he never paid any taxes on the said property, nor in any manner exercised any acts of ownership therein; and that the taxes on the same have been paid during all said time by the defendant, John C. Brautigam. That during the fall of 1884, and the time prior to the commencement of this action, the plaintiff herein had the ability to pay and discharge said note and mortgage, and that he could have arranged for the payment of said note and mortgage at any time from said date to the commencement of this action. . . . That during most of the time from the date of the purchase of said property until the commencement of this action, the plaintiff was in the vicinity of Edison, Skagit county, Washington, and was in the city of Seattle at least six times in the year 1884, the year when said note and mortgage matured."

Upon these facts the court adjudged appellant chargeable with such laches as ought to deprive him of the relief sought, and held his case to be without equity.

It will be observed that the two matters found to constitute laches were the non-payment of taxes and the non-payment of the note, though the appellant possessed the ability to pay and resided in a neighboring county. But neither of these matters seems to us sufficient to justify a refusal to set aside a judgment entered without jurisdiction, where the party against whom the judgment was entered had no notice either of the judgment or that any one was claiming

May, 1894.] Opinion of the Court—STILES, J.

his land. The mortgage provided for the addition of any taxes paid by the mortgagee to the sum recoverable upon foreclosure; and as to the note, the law charges nothing except interest as a penalty for the non-payment of such overdue obligations. The land does not appear from the record to have been in the actual occupancy of anyone, and therefore required no attention. No amount of attention would have disclosed the fact that a foreclosure had taken place; and there is no rule of law which requires a mortgagor in arrears to keep watch of the court records to see whether a judgment has been entered up against him without his knowledge.

Passing this point, we come next to the main question discussed by counsel, viz., the effect of a judgment rendered against a party not served with process but in whose behalf an unauthorized attorney appears or pleads. Appellant claims that such a judgment is voidable when directly attacked, as in this case; while respondents maintain that it is invulnerable, the party's remedy being an action for damages against the attorney unless he is shown to be insolvent; or that it must stand as against an innocent third party; or that there can be no relief unless a good defense is shown in connection with the application for relief.

A judgment of this kind is void in fact, although the appearance of an attorney is presumed to be authorized, so that the face of the record shows no defect other than the want of actual service; and it will be set aside as a nullity although innocent third parties may suffer, when the application for relief is made promptly upon discovery of the existence of the judgment, and upon clear and convincing proof that the attorney did not have authority to appear. *Harshey v. Blackmarr*, 20 Iowa, 161; *Newcomb v. Dewey*, 27 Iowa, 381; *Great West Mining Co. v. Mining Co.*, 12 Col. 46 (20 Pac. 771); *Shelton v. Tiffin*, 6 How. 163; *Williams v. Neth*, (Dak.) 31 N. W. 630, and note; *Arno*

v. Wayne Circuit Judge, 42 Mich. 362 (4 N. W. 147); *Mutual Life Ins. Co. v. Pinner*, 43 N. J. Eq. 52 (10 Atl. 184); *Glass v. Smith*, 66 Tex. 548 (2 S. W. 195); *Anderson v. Hawhe*, 115 Ill. 33 (3 N. E. 566); *First National Bank v. Wm. B. Grimes, etc., Co.*, 45 Kan. 510 (26 Pac. 56); *Stocking v. Hanson*, 35 Minn. 207 (28 N. W. 507); *Garrison v. McGowan*, 48 Cal. 592; *Bayley v. Buckland*, 16 L. J. Exch. 204; *Mechem*, Agency, § 810.

The principal authority to the effect that the remedy is against the attorney only, when he is solvent, is found in New York, where, since *Denton v. Noyes*, 6 Johns. 297, that has been the rule. But the decision of the court of appeals of that state in the recent case of *Vilas v. Plattsburgh, etc., R. R. Co.*, 123 N. Y. 440 (25 N. E. 941), while it followed what was conceded to be the settled law of the state, showed a disposition on the part of the court to restrict the rule to the most meager limits, and gave it only the coldest approval.

The rule as to showing a meritorious defense has no application in a case of this kind, where the applicant for relief does not seek to be discharged from the burden of his obligation, but merely asks that his property, which was taken from him without any process of law of which he had notice, be returned to him upon his satisfaction of the just lien created by the mortgage. Were it not that the statute of limitations would now bar a suit for foreclosure, equity would not demand a tender in order to procure the avoidance of the judgment; the court would simply clear its record of that which had been entered there without jurisdiction, although formally regular.

It frequently happens that courts have to decide between two innocent parties to the disadvantage of one or the other, and it may be so here. Brautigam, the plaintiff in the foreclosure suit, and the purchaser at the sale, was not an innocent purchaser. He knew he had not served ap-

May, 1894.] Opinion of the Court — STILES, J.

pellant, and in taking his judgment upon the voluntary and unquestioned appearance of attorneys he took the risk that that appearance might be unauthorized. As was said in *Bayley v. Buckland*, *supra*:

“The plaintiff in such a case is not wholly free from the imputation of negligence; the law requires him to give notice to the defendant by serving the writ, and he has not done so. The defendant, therefore, is wholly free from blame, and the plaintiff is not.”

If he was misled by the attorney he has his remedy. Again, one cannot claim to have been an innocent purchaser in any case where he was the judgment creditor under whose execution the property was sold. The judgment roll disclosed the want of service and the voluntary appearance, and was information to all purchasers of the title from Brautigam of the infirmity that might exist therein, even if notice of the infirmity were necessary.

Respondents Leary and Kinnear having been voluntarily dismissed in the superior court, should not have been included in the notice of appeal. Having been so included, upon the appellant's confession they are entitled to costs of their motion for dismissal here.

We find no internal evidence that the statement of facts does not contain all that the act of 1891 required in equity cases. From the brief and argument we gather that there was a contest before the court as to whether the statement should contain the actual testimony, or the reporter's shorthand notes of the trial, including colloquies between counsel, etc. Fortunately the best counsel prevailed, and we have a record of the case, and nothing else. The judge took the proposed statement and the proposed amendments under advisement, and after consideration determined to certify, and did certify, the former as the statement. Some confusion of dates occurred in this connection; but there

was nothing which rendered the proceeding subject to a motion to strike or dismiss.

A motion is made to dismiss because the surety on the appeal bond did not include in his affidavit the statement that his property was in this state. This matter should have been addressed to the superior court upon an exception to the sufficiency of the surety, and not have been permitted to lie dormant until it was too late for appellant to have the affidavit corrected or furnish a new bond. Section 10 of the appeal act of 1893 (Laws 1893, p. 124) is very blunt in its statement that an appeal bond "shall be of no force" unless the affidavit shows certain things; but as the affidavit is not conclusive of anything stated in it, so we think it was not meant that a bond wanting in some of the particulars mentioned should be absolutely void. Probably if the judgment had been affirmed respondents would have been ready enough to maintain it as a binding obligation. The construction is, we think, that such a bond is merely open to objection to be taken in the manner provided in §11; and no such objection having been made, the defect was waived.

The judgment will be reversed, and the cause remanded for a new judgment in accordance with the prayer of the complaint.

DUNBAR, C. J., and ANDERS, J., concur.

HOYT and SCOTT, JJ., dissent

Mar. 1894.] Opinion of the Court—HOYT, J.

[No. 1162. Decided February 7, 1894.]

THE STATE, *on the relation of G. W. Shelly and H. E. Shelly*, v. THE
SUPERIOR COURT OF CHEHALIS COUNTY *et al.*

Original Application for Prohibition.

Greene & Turner, for relators.

M. J. Cochran, and J. B. Bridges, for respondents.

HOYT, J.—This case presents the same questions as that of *State, ex rel. Hunt & Mottet, v. Superior Court of Chehalis County*, ante, p. 210, and for the reasons stated in the opinion in that case the alternative writ of prohibition must be made perpetual.

STILES, ANDERS and SCOTT, JJ., concur.

DUNBAR, C. J., dissents.

[No. 1257. Decided March 28, 1894.]

 Kb 659
13 708

THE STATE OF WASHINGTON, *on the relation of A. E. Rice, Prosecuting Attorney of Lewis County, Appellant*, v. THE CITY OF CENTRALIA *et al.*, Respondents.

Appeal from Superior Court, Lewis County.

A. E. Rice, and Miller Murdoch, for appellant.

G. T. Swasey, for respondents.

HOYT, J.—Many questions were presented in this case not involved in that of *The City of Pullman v. Hungate*, ante, p. 519, and it is probable that the action of the court below in sustaining the legality of the incorporation of the defendant could be sustained without the aid of the act of March 9, 1893 (Laws, p. 183), but the conclusion to which we have come, as shown in the case just cited, as to the effect of that act makes it unnecessary for us to discuss the other questions presented by the record.

The judgment of the superior court must be affirmed.

DUNBAR, C. J., and SCOTT, J., concur.

STILES, J. (*concurring*).—For the reasons given by me in *Pullman v. Hungate*, I should dissent in this case. But I am very much in doubt whether the act of 1888 (Laws, p. 221) was void as to this corporation, which had a valid, legal existence as a corporation by special act, and merely undertook to re-incorporate under the law

of 1888. See § 26, p. 231, and *Burlington v. Leebrick*, 43 Iowa, 252, and I shall therefore concur in the result.

ANDERS, J.—I concur in the above.

[No. 1169. Decided May 1, 1894.]

GEORGE F. PEABODY, *Appellant*, v. THOMAS G. NICKLIN, *Respondent*.

Appeal from Superior Court, Whatcom County.

Black & Leaming, for appellant.

Dorr, Hadley & Hadley, and *Bruce & Brown*, for respondent.

DUNBAR, C. J.—For the reasons assigned in the case of *Edson v. Knox*, *ante*, p. 642, and for the further ground of estoppel as found by the lower court, the judgment herein is affirmed.

STILES, HOYT, ANDERS and SCOTT, JJ., concur.

[No. 1170. Decided May 1, 1894.]

LENA ISENSEE, *Respondent*, v. GEORGE F. PEABODY, *Appellant*.

Appeal from Superior Court, Whatcom County.

Fairchild & Rawson, and *Black & Leaming*, for appellant.

Bruce, Brown & Cleveland, for respondent.

DUNBAR, C. J.—For the reasons assigned in the case of *Edson v. Knox*, *ante*, p. 642, and for the further ground of estoppel as found by the lower court, the judgment herein is affirmed.

STILES, HOYT, ANDERS and SCOTT, JJ., concur.

REPORTS OF CASES
DECIDED IN
THE SUPREME COURT
OF THE
STATE OF WASHINGTON,
AT THE
MAY SESSION, 1894.

8	061
16	297
17	480
8	061
19	604
8	061
40	227

[No. 926. Decided May 17, 1894.]

H. C. COMEGYS, *Respondent*, v. THE AMERICAN LUMBER
COMPANY, *Appellant*.

AGENCY—EVIDENCE—DECLARATIONS OF AGENT—INSTRUCTIONS.

Agency can never be established by the declarations of an alleged agent; and the erroneous admission of such declarations in evidence in an action against the alleged principal are not cured by a charge to the jury that agency cannot be proved by the declarations of the agent, unless it appears reasonably certain from all the facts and circumstances in the case that no injury has resulted to the defendant by reason of the admission of such testimony.

In an action for the price of logs plaintiff should be non-suited, when the evidence of a sale to defendant is that the logs were purchased by an alleged agent, and the only proof of the alleged agency were the declarations of the agent himself, which there was no testimony adduced to show had ever been brought to the knowledge of defendant and ratified in any way.

In an action to recover upon an express contract for the sale of logs, an instruction that if defendant had converted the logs to its own use it would be liable for their value, is erroneous.

Appeal from Superior Court, King County.

Struve & McMicken, and James Kiefer, for appellant.
Ronald & Piles, for respondent.

The opinion of the court was delivered by

ANDERS, J.—The respondent instituted this action to recover the purchase price of logs claimed to have been sold appellant. It is alleged in the complaint that the defendant at all the times therein mentioned was and still is a corporation organized and existing under and by virtue of the laws of the State of Washington, and engaged in lumbering and the manufacture of lumber in Seattle, Washington; that on July 21, 1891, the defendant became and still is indebted to the plaintiff in the sum of \$711.83 on account of saw logs sold and delivered by plaintiff to defendant at its special instance and request, and for which the defendant then and there agreed to pay plaintiff the said sum of \$711.83, no part of which has been paid. For a second cause of action it is alleged that on said July 21, 1891, the defendant became indebted to James Pearl in the sum of \$677.93, on account of saw logs then and there sold and delivered by said James Pearl to defendant and at its special instance and request, which amount the defendant agreed to pay therefor, but which sum has not been paid, nor any part thereof, and that on February 25, 1892, the said Pearl for a valuable consideration sold, assigned and set over to the plaintiff all his right, title and interest in and to his said claim against the defendant for and on account of said sale of logs.

The contract for the transfer of the logs mentioned in the complaint was made, as the undisputed testimony shows, with one William Melvin, and the plaintiff, in order to prove the allegations of the complaint, undertook to show to the court and jury that the said Melvin was in fact the agent of the defendant, and that the logs were really sold to defendant, through him as such agent. During the course of the trial, the court permitted both the plaintiff and his assignor Pearl to testify, over the objec-

May, 1894.] Opinion of the Court—ANDERS, J.

tion of the defendant, that Melvin, when he proposed to them to purchase the logs in question, stated that he was the agent of the appellant, and desired to buy the logs for it. This ruling of the court was clearly erroneous. In no event are the mere declarations or admissions of an alleged agent, made out of court, competent testimony to establish the fact of his agency. No one can clothe himself with power to represent another or to bind him by his acts or declarations. An agent is but the creature of his principal and derives all of his power as such from his principal, and an agency can only be established by showing some admission, act or declaration of the alleged principal. But the fact of agency being once established by proper evidence, then the acts and declarations of the agent done or made within the scope of his agency, and while employed in or about the business of his principal, are binding upon the principal, for the reason that the acts and declarations of the agent are then deemed to be the acts and declarations of the principal himself. But this principle cannot apply to declarations which merely go to show the existence of the agency.

This distinction was obviously overlooked by the learned counsel for the respondent, for it is urged by them in their brief that there was no error in the ruling of the court under consideration because there was other evidence in the case tending to establish Melvin's agency, and the question then was as to the order of the proof merely, which was clearly within the discretion of the court. We concede that it was within the discretion of the court to admit such declarations and admissions of Melvin in evidence as would have been binding upon the appellant, if he was in fact its agent, without first calling for proof of his agency, although we think such a practice should not be adopted except for special reasons; but the fact is that the testimony here complained of was not admissible at

any time, or at all. *Mechem on Agency*, § 100; *Peck v. Ritchey*, 66 Mo. 114.

Nor do we think the court cured the error complained of by charging the jury generally that the agency of Melvin could not be proved by his own declarations. To effect that result the objectionable testimony should at least have been specifically withdrawn from the consideration of the jury, and even if that had been done it would still be difficult to say, under the circumstances, that it would have been altogether harmless to appellant. The appellant, like every other suitor in a court of justice, had a legal right to insist that only competent testimony should be adduced against it, and incompetent testimony having been introduced over its objection, the judgment against it should be reversed, unless from all the facts and circumstances in the case, including the charge of the court to the jury, it appears reasonably certain that no injury resulted therefrom to the appellant. *State v. Meader*, 54 Vt. 126; *Mussey v. Mussey*, 68 Me. 346; *Crane v. Andrews*, 6 Col. 353; *Farmers'*, etc., *Bank v. Whinfield*, 24 Wend. 418.

And in this case we are by no means convinced that the testimony objected to did not influence the minds of the jury unfavorably to the defendant.

It is contended by appellant that the evidence on the part of the plaintiff in the court below was insufficient to prove a cause for the jury, and that the court therefore erred in denying its motion for a non-suit at the close of plaintiff's testimony. And as we view the evidence the motion should have been granted. The allegations of the complaint show that respondent based his right of recovery upon the fact that he had sold and delivered the logs in dispute to the appellant, and he tried his case entirely upon the theory that Melvin was the agent of the appellant, and that a sale to him was a sale to appellant. But at the time the motion for non-suit was interposed no evidence

May, 1894.] Opinion of the Court—ANDERS, J.

had been offered on the part of the plaintiff to establish the agency of Melvin, which was denied by the defendant, except his own declarations, and no testimony whatever had been adduced to show any knowledge of these declarations of Melvin on the part of any authorized officer of the defendant corporation.

We cannot agree with respondent's counsel in their contention that the statements made by McMasters, the general business manager of the appellant, to respondent, when the latter presented his bill for the value of the logs, or the statement of McConnell, appellant's log buyer, to Pearl, when the former went to examine the logs to ascertain if their quality was such as was represented by Melvin, amounted to an admission that Melvin was appellant's agent. Nothing that was said or done by either McMasters or McConnell could, in our judgment, be reasonably construed into a recognition of an agency on the part of Melvin. Nothing was said in those conversations by appellant's agents, or either of them, inconsistent with the claim of appellant that it had agreed to buy these logs from Melvin, who claimed to be the absolute owner of them. In fact, although the logs had been towed to appellant's mill by direction of Melvin, prior to the time when the respondent presented his bill for their value, they had not been received by the appellant, but had been rejected, and the sale had not at that time been consummated, and appellant did not then claim to be the owner of the logs.

We fully recognize and approve the rule contended for by the respondent, that the weight of the evidence is a question for the consideration of the jury. But, where, in a given case, the plaintiff fails to produce any evidence beyond mere conjecture to support the allegations of his complaint, we think the defendant is entitled, under the statute, to a judgment of non-suit. It was not denied by

the defendant that it bought these logs from Melvin, but it was denied that Melvin was ever authorized to purchase them, or any other logs, from the respondent, or any other person, for it or on its account. The question of Melvin's agency was, therefore, the controlling question in the case, and plaintiff was not entitled to a recovery until he had established this controverted fact; and, having failed to produce any evidence from which the jury could have legitimately concluded that Melvin was the agent of the appellant, there was nothing in the case made by the plaintiff for the jury to pass upon.

At the conclusion of the trial the court charged the jury. among other things, that—

“If you find from the evidence that the defendant, or its manager McMasters, knew or had notice prior to the time that he made the alleged payment to Melvin for the logs, that the plaintiff and the witness Pearl were the owners of, or claimed to be the owners of the logs in question, and with such knowledge purchased the logs from Melvin, and converted them to their own use, then I charge you, payment, if any you find was made to Melvin, was made at its hazard, and the plaintiff is entitled to recover for the reasonable value of said logs if you find by a preponderance of the evidence that plaintiff and witness Pearl were the owners of the logs.”

This instruction, although a correct statement of the law in a proper case, was not pertinent to the issues to be determined by the jury. The plaintiff in his complaint had stated the facts constituting his cause of action in accordance with the requirements of the code, and the cause of action stated was based upon an express contract, and could not be proved by showing that the defendant was guilty of a tort. The question as to whether the defendant had converted the property of the plaintiff to its own use, and was, therefore, liable for its value, was not in issue, and should not have been submitted to the jury. It

May, 1894.] Opinion of the Court — ANDERS, J.

is not in accordance either with the letter or the spirit of the code to permit a plaintiff to allege one state of facts in his complaint and to recover by proof of an entirely different state of facts at the trial. *Distler v. Dabney*, 3 Wash. 200 (28 Pac. 335).

The appellant further contends that the court erred in refusing to give the first and second instructions asked for by the defendant in their entirety, and it seems to us that the court should have given them as requested, for certainly if the part given was good law, the portion omitted was equally correct.

We are also of the opinion that the fourth and fifth instructions asked for by the defendant should have been given without modification by the court, as the law applicable to the case was more clearly stated therein than it was in the instructions as given.

As we feel fully satisfied from a careful consideration of all the evidence in the record that the appellant is at least entitled to a non-suit, we will not now undertake to pass upon the question raised by the court's refusal to direct the jury to return a verdict in favor of the defendant at its request.

The judgment is reversed, and the cause remanded to the lower court with instructions to enter a judgment of non-suit upon defendant's motion.

HOYT and STILES, JJ., concur.

DUNBAR, C. J., and SCOTT, J., dissent.

8	668
16	70
8	668
64	164

[No. 1046. Decided May 17, 1894.]

CLARK FERGUSON, *Appellant*, v. THE CITY OF SNOHOMISH, *Respondent*.

ACTION AGAINST MUNICIPAL CORPORATION — DENIAL OF CORPORATE EXISTENCE — EXTENSION OF CITY LIMITS — TAXATION — AGRICULTURAL LANDS WITHIN CITY LIMITS.

The validity of the incorporation of a city cannot be questioned in an action brought against it as a municipal corporation; nor can its corporate existence be attacked in a collateral action.

The constitution and statutes thereunder, providing for the incorporation of cities and towns, do not confine the corporation to the exact limits of any preëxisting city or town, but the question of boundary may be determined by the vote of the people within the limits of the proposed incorporation upon the submission of a proposition therefor by the county commissioners based upon the petition of residents within the proposed boundaries.

The municipal taxation of agricultural lands included within the corporate limits of a city is not unconstitutional on the ground that it is a taking of private property without just compensation.

Appeal from Superior Court, Snohomish County.

W. R. Andrews, for appellant.

L. H. Coon, for respondent.

The opinion of the court was delivered by

ANDERS, J.—It is provided, among other things, in § 10, art. 11 of the state constitution, that—

“Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization and classification, in proportion to population, of cities and towns, which laws may be altered, amended or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith.”

May, 1894.] Opinion of the Court — ANDERS, J.

By virtue of the authority conferred by this section, the legislature of the state passed an act, approved March 27, 1890 (Laws 1889-90, p. 131), entitled "an act providing for the organization, classification, incorporation and government of municipal corporations, and declaring an emergency." Section 1 of this act declares that —

"Any portion of a county containing not less than three hundred inhabitants, and not incorporated as a municipal corporation, may become incorporated under the provisions of this act, and when so incorporated shall have the powers conferred, or that may hereafter be conferred, by law upon municipal corporations of the class to which the same may belong."

Some time in the year 1888, the inhabitants of the village of Snohomish attempted to incorporate under the act of February 2, 1888 (Laws 1887-8, p. 221), but as that act was declared void by this court in *Territory, ex rel. Kelly, v. Stewart*, 1 Wash. 98 (23 Pac. 405), such village never had a legal corporate existence. On May 19, 1890, a petition, signed by the requisite number of persons residing within the boundaries therein prescribed, was presented to the county commissioners of Snohomish county, praying for the incorporation of a city of the third class, under the provisions of said act of March 27, 1890. The boundaries of the proposed city, as described in the petition, included the former village of Snohomish, and in addition thereto some two hundred and forty acres of land belonging to appellant, which was contiguous to said village, but only forty acres of which was included therein under the attempted incorporation by virtue of said act of February 2, 1888. At the time of the presentation of the petition these lands were occupied by appellant and his family only; were not laid out into town lots or blocks, but were used by him as a dairy farm exclusively. But a portion of appellant's lands abutted on the block of land

upon which was situate the county court house, and on the west and north of said premises were several additions to the town, containing, altogether, about sixty inhabitants.

Upon the hearing of the petition, the appellant appeared before the commissioners and objected to their including his lands within the boundaries of the proposed corporation, but offered to be satisfied if they would include the forty acres formerly included in the original village, and allow the balance to remain outside. The commissioners, however, did not see fit to change the boundaries as prayed for, and an election was ordered and held, the votes canvassed, and the incorporation was thereupon declared complete. No legal proceeding, however, was instituted by appellant to correct any supposed error on the part of the board of commissioners, or to prevent them from submitting the question of incorporation to the vote of the people in accordance with the provisions of the statute. But, after the formation of the corporation, and after his land had been sold for city taxes which he neglected to pay, he brought this action to have the proceedings of the county commissioners by which his lands were included within the city of Snohomish declared null and void, to remove the cloud cast upon his title to said land by said tax sale, and to enjoin the said city, its officers and agents, from further assessing or attempting to assess, or selling or attempting to sell, his said lands and premises or any part thereof.

The first contention of the learned counsel for the appellant, is that the board of county commissioners of a given county have no right, under the constitution and laws of this state, to include within the boundaries of a municipal corporation lands which are used purely for agricultural purposes. But we are of the opinion that the appellant is not in a situation to question the validity of the incorporation of the city of Snohomish, for the reason that he has

May, 1894.] Opinion of the Court—ANDERS, J.

brought his action against it as a municipal corporation, and alleged it to be such in his complaint; and even if he had not done so he could not, according to the weight of authority, attack the corporate existence of the city in a collateral action like this. 1 Dill., Mun. Corp. (4th ed.), § 43a, and cases cited; Cooley's Const. Lim. (5th ed.), p. 311.

But, irrespective of the foregoing considerations, we think the appellant's contention cannot be sustained. No irregularities in the proceedings whereby the respondent city claims to have become incorporated have been pointed out, and only the right to establish the boundaries thereof so as to include the lands of appellant is questioned. It is not denied that in the absence of constitutional inhibition the legislature might, by special act, have incorporated the city with its present boundaries, but it is insisted on behalf of the appellant that, inasmuch as the constitution of this state only authorizes the legislature to provide for the incorporation of cities and towns, nothing but cities and towns proper can legally be incorporated; or, in other words, no territory not actually covered by the city or town desiring to become incorporated can be embraced within its limits. Several cases are cited in support of counsel's position, all of which, no doubt, were decided in accordance with the local statutes upon the subject and the facts before the court. Prominent among these cases is that of *Ewing v. State*, 81 Tex. 172 (16 S. W. 872), in which the supreme court of Texas held that the attempted incorporation of the city of Oak Cliff, containing about two thousand inhabitants, and actually covering an area of about two square miles, so as to include within its new boundaries about ten square miles of rural territory, not part of that city, nor of any other city, and comprising farms, pastures and unoccupied surveys of land, could not be sustained, under a statute providing that, "when a city

or town may contain one thousand inhabitants or over, it may incorporate as a city or town in the manner prescribed by chapter 11 of this title." But the same court, under the same statute, held in *State v. Town of Baird*, 79 Tex. 63 (15 S. W. 98), that the incorporation of a town may properly include the territory occupied by the persons attending church, sending to the schools, and residing near to others making up the proposed town; and that this may be done regardless of whether the lands be laid out into lots or blocks. In the course of the opinion the court observed that, "It may not always be practicable to incorporate a town without including within its limits some territory devoted purely to pastoral or agricultural pursuits. Something may be allowed for prospective expansion."

Our statute concerning the incorporation of towns and cities is broader than that of Texas upon which those decisions were based. In providing a method for the incorporation of cities and towns, the legislature, recognizing the impossibility of fixing by a general law the exact boundaries of every municipality that might be organized thereunder, left that important question to be determined by the county commissioners and the people within the limits of the proposed incorporation; and when they provided that any portion of a county containing not less than three hundred inhabitants may become incorporated, they did not intend to confine the corporation to the exact limits of any preëxisting town or city, but did intend to allow something for "prospective expansion."

We are not prepared to say that the statute under which the city of Snohomish became incorporated is in contravention of the constitution; nor are we prepared to hold that the appellant's lands were legally included within the city limits. This court held in *Campbell's case*, 1 Wash. 287 (24 Pac. 624), that the inhabitants of towns which had attempted to incorporate under the void act of February 2, 1888, may incorporate under the act of March 27, 1890,

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with a larger territory than that included in the original boundaries. While it is true that a town or city cannot exist upon entirely vacant and unoccupied lands, we think it is equally true, as was said in *Kelly v. Pittsburgh*, 104 U. S. 78, that the question of "how thickly or how sparsely a territory within a city must be settled is one of the matters within legislative discretion."

But it is further contended by the appellant that even if his lands were properly included within the corporate limits of the city, they are not subject to taxation for general municipal purposes, because such taxation would be a taking of private property without just compensation. This view of the law, although favored by the courts of Iowa and Kentucky (*Morford v. Unger*, 8 Iowa, 82; *Covington v. Southgate*, 15 B. Mon. 498), is contrary to the great weight of authority in this country. In regard to municipal taxation, our constitution provides that "such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same," and the doctrine contended for by appellant is in direct contravention of that provision, and must, therefore, be rejected. Cooley, *Const. Lim.* (5th ed.), p. 626; Cooley, *Taxation* (2d ed.), pp. 158-9; 2 Dill., *Mun. Corp.* (4th ed.), §§ 794-5; *Powers v. Commissioners*, 8 Ohio St. 285; *Blanchard v. Bissell*, 11 Ohio St. 96; *Washburn v. Oshkosh*, 60 Wis. 453 (19 N. W. 364); *Cary v. City of Pekin*, 88 Ill. 154; *Kountze v. City of Omaha*, 5 Dill. (C. C.) 443; *Davis v. Pt. Pleasant*, 32 W. Va. 289 (9 S. E. 228); *City of Santa Rosa v. Coulter*, 58 Cal. 537; *Kelly v. Pittsburgh*, 85 Pa. St. 170; *Kelly v. Pittsburgh*, 104 U. S. 78; *State v. Town of Baird*, *supra*; *Hurla v. Kansas City*, 46 Kan. 738 (27 Pac. 143).

The judgment of the court below is affirmed.

DUNBAR, C. J., and HOYT, SCOTT and STILES, JJ., concur.

8	674
16	616
8	674
35	608
8	674
41	608

[No. 1099. Decided May 17, 1894.]

JAMES K. ELDERKIN, *Receiver, Respondent*, v. FRED H.
PETERSON, *Appellant*.

CORPORATIONS—SUBSCRIPTIONS TO STOCK—RIGHT OF RECEIVER
TO ENFORCE—PLEADING—INSTRUCTIONS.

The receiver of an insolvent corporation may bring a separate suit against a stockholder to recover any sum due upon his share of stock.

In an action by the receiver of an insolvent corporation to recover upon unpaid subscriptions to its stock, the defendant cannot question the regularity of the appointment of the receiver nor the judgment of the court as to the necessity of collecting the unpaid subscriptions to capital stock.

In such an action a complaint does not state a cause of action, under Gen. Stat., § 1507, when it fails to allege that the defendant had notice of the call for assessments upon his stock, made by the receiver under the order of the court.

In such an action a charge to the jury that "it matters not whether the full quota of stock was subscribed or not in this case" is erroneous because it assumes that the evidence shows such conduct on the part of the defendant as an officer of the corporation as would amount to a waiver of the defense that the whole of the capital stock had not been subscribed.

The fact that a certificate of stock purports on its face to be paid up stock of a corporation will not warrant the court in instructing the jury that the certificate should be considered as paid up and non-assessable, when the plaintiff enters a denial to such defense and introduces evidence showing that the certificate was not issued as paid up by the authority of the corporation.

Where an action is brought to recover the whole amount unpaid on the stock of an insolvent corporation held by the defendant, and which had been declared to be due and payable by order of the court, sitting as a court of equity, it is error for the court to charge the jury that defendant is not liable to pay the whole of the unpaid balance of his subscription, unless the evidence shows that it is necessary in order to discharge the debts and liabilities of the corporation.

Appeal from Superior Court, King County.

Fred H. Peterson, and Battle & Shipley, for appellant.

May, 1894.] Opinion of the Court—ANDERS, J.

Wiley & Bostwick, and Thompson, Edsen & Humphries,
for respondent.

The opinion of the court was delivered by

ANDERS, J. — The respondent was appointed receiver of the Seattle Insurance Company by the superior court of King county, and as such receiver was directed by said court to collect from the subscribers and stockholders of said corporation the whole of their subscriptions to the capital stock of the company. Thereafter the respondent instituted this action to recover the sum of \$38,829.33, alleged to be due from the appellant as the unpaid balance on the capital stock of the company held and owned by appellant at the time of the commencement of the action. The defendant filed a motion to strike from the complaint certain designated portions thereof, which motion was in part sustained and in part denied, and the defendant then interposed a general demurrer to the complaint, which was overruled by the court, and thereupon the defendant filed his answer, which denied certain allegations of the complaint and admitted certain other allegations thereof, and which also set up four separate affirmative defenses. The plaintiff demurred to each of the affirmative defenses pleaded, and the demurrer was sustained as to the first, third and fourth defenses, and overruled as to the second, whereupon plaintiff replied, denying the allegations contained in the second of said affirmative defenses. A trial was had, resulting in a judgment in favor of the plaintiff for the sum of \$8,861.

The appellant's first contention is, that the court committed error in overruling his demurrer to the complaint. He urges several propositions in support of his position, the first of which is that the receiver should have instituted an action in equity and not at law, and made all the other stockholders parties defendant, or, at least, should have

assigned some reason why the holders of the remaining shares of stock were not made defendants. And he cites the case of *Burch v. Taylor*, 1 Wash. 245 (24 Pac. 438), as authority for the proposition that it is the settled law of this state that unpaid subscriptions to the capital stock of a corporation can only be recovered by a proceeding in equity. An examination of that case, however, will disclose the fact that it was an action brought by a creditor of a corporation, who was also a stockholder, against another stockholder, to recover an unpaid balance upon a subscription; and the court held that, in that class of cases, the remedy must be in equity and not at law. But the case at bar is of a different character, and the doctrine announced in that case is not necessarily applicable to this. A stockholder is a debtor of the corporation to the amount unpaid upon his shares of stock, and the receiver in this instance, as the representative of the corporation, is simply seeking to collect such a debt. He has succeeded to all the rights of action which were vested in the insurance company. 20 Am. & Eng. Ency. Law, p. 235. And as the corporation itself, under the circumstances of this case, might have maintained an action at law against the appellant, we have no doubt that the action was properly brought by the receiver. It is said in *Wait on Insolvent Corporations*, § 235, that—

“The receiver of an insolvent corporation may bring separate suits against the several stockholders to recover any sum remaining due upon their shares of stock. If the corporation has instituted suit for the unpaid subscription, the receiver may continue the action in the name of the original plaintiff.”

And, under what circumstances a separate action at law may be brought in this class of cases is clearly explained by Thompson in his treatise on *Liability of Stockholders*. In § 349 of that work the learned author says that if the

May, 1894.] Opinion of the Court—ANDERS, J.

liability of stockholders is limited, and several—each one standing responsible for a definite sum, and no more—and if, under the particular statute, an action at law will lie, then a separate action may be brought against each one; but if the liability of stockholders is primary and unlimited, like that of partners, all should be joined, for such an action is *quasi ex contractu*. See also Boone on Corporations, §§ 108, 119; Beach on Receivers, § 666; *Dayton v. Borst*, 31 N. Y. 435; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Billings v. Robinson*, 94 N. Y. 415; *Selma & Tenn. R. R. Co. v. Tipton*, 5 Ala. 787.

The next objection to the complaint is, that it is not alleged therein that defendant had any notice of the application for the appointment of a receiver, or any notice whatever of the petition upon which it was adjudged that the receiver collect from the subscribers and stockholders of said corporation the whole of their subscriptions to the stock of the corporation. But we are of the opinion that the appellant cannot now question the regularity of the appointment of the receiver, or the judgment of the court as to the necessity of collecting the unpaid subscriptions for the purpose of paying the company's debts. When assessments are made by officers or persons properly authorized so to do, the necessity for making the calls cannot be questioned by the stockholders. *Budd v. Multnomah St. Ry. Co.*, 15 Or. 413 (15 Pac. 659); *Chouteau Ins. Co. v. Floyd*, 74 Mo. 291. The court not only had a right, under the statute, to appoint the receiver, but it was also authorized to make a call requiring stockholders to pay for their stock. Wait on Insolvent Corporations, § 218; *Scovill v. Thayer*, 105 U. S. 143.

Lastly, it is insisted that the complaint is insufficient for want of an allegation that the appellant had notice of the call made by the court, and that demand was made for payment in accordance with the order of the court. This ob-

jection, in our opinion, is unanswerable. While the court must be held to have properly made the order to collect all unpaid subscriptions to the capital stock of the insolvent company, and while it was the duty of the receiver to collect the same for the benefit of creditors, yet, as we construe our statute upon this subject, the appellant was entitled to notice of the assessment, and to have an opportunity to pay it before an action could properly be brought against him to recover the amount of the call. It is true there is a diversity of opinion among the decisions of the courts upon this question, but we believe all of the cases recognize the principle that statutory provisions must be complied with. Cook on Stock and Stockholders (3d ed.), § 117. And in § 1507, Gen. Stat., it is provided that in all cases, notice of each assessment shall be given to the stockholders personally or by publication in some newspaper published in the county in which the principal place of business of the corporation is located; and if none be published in such county, then in the newspaper nearest to said principal place of business in the state. It is urged, however, on behalf of the respondent that this provision only applies in cases where the corporation undertakes to sell the stock of defaulting shareholders for the payment of their assessments, and that notice of the assessment is not required to support an action at law to enforce such payment. But we do not think the statute above mentioned will admit of such construction, for it plainly states that notice must be given in *all* cases, and not merely in those in which the corporation seeks to apply the proceeds of stock in payment of assessments. The cases cited in support of appellant's position from New York and Indiana, according to our understanding of them, were based on statutes much less specific than ours. *Lake Ontario, etc., Ry. Co. v. Mason*, 16 N. Y. 451; *Smith v. Indiana & Illinois Ry. Co.*, 12 Ind. 61; *Heaston v. C. & F. W. R. R. Co.*, 16 Ind.

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275. And even in the case last cited it was said that where the statute requires notice, it must be given.

A learned text writer lays down the law on this subject as follows:

“The general rule is, that, in the absence of an express provision in the charter or articles of association of a corporation, requiring notice to be given to the shareholders after a call has been voted, no notice is necessary in order to hold the shareholders liable to pay the amount of the call; and it has been held that no demand is required before the institution of a suit.” 1 Morawetz on Private Corporations, § 147.

See, also, Cook on Stock and Stockholders (3d ed.), § 118; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316; *Granite Roofing Co. v. Michael*, 54 Md. 65; *Dexter and Mason Plankroad Co. v. Millerd*, 3 Mich. 91.

The provision of the statute requiring notice of the assessment to be given to the stockholders is, of course, as fully applicable to assessments made by the courts as it is to those made by trustees. It is suggested in the brief of the respondent that the allegations in the complaint that certain assessments were made by the trustees of the company, and that the defendant was present at the time the assessments of stock were made by the board of trustees of said corporation, and made the motion before said board for the assessment of said stock to pay said losses incurred by said corporation, amount to an averment that the appellant had notice thereof. But even if that be so, which we do not decide, it could be of no avail to respondent here, for this action was not based upon an assessment made by the trustees, but upon that made by the court. From what we have said it follows that, in our opinion; defendant's demurrer ought to have been sustained; and for the same reasons the plaintiff's demurrer to defendant's third and fourth affirmative defenses, in which he pleaded want of notice, should have been overruled.

As a first affirmative defense to the action, the defendant alleged that the whole amount of the capital stock of this corporation had never been subscribed, and that he had no notice whatever of that fact until on or about August, 1890, and that he thereafter refused to pay any part of said calls or assessment of stock, and refused to ratify the same. As we have before stated, the court sustained the demurrer to this plea, and appellant now insists that the ruling of the court thereon was erroneous. But, if it was wrong, the appellant was not injured thereby for the reason that the decision of the court was, in fact, disregarded at the trial, and evidence was introduced both to prove and to disprove that the whole twenty-five hundred shares of capital stock were subscribed. It is a general rule in this country that a stockholder is not liable on his subscription to capital stock of a corporation unless the whole of the capital stock has been subscribed. *Denny Hotel Co. v. Schram*, 6 Wash. 134 (32 Pac. 1002).

But the appellant concedes that the rule is not without exception, and that in a particular case the circumstances may be such that the defendant may be estopped from availing himself of the defense that the whole amount of the stock was not subscribed. He insists, however, that, in this instance, the charge of the court took from the jury the determination of the question whether or not the whole of the capital stock was subscribed, or whether the evidence established an estoppel as against the defendant; and, further, that the charge assumed that the defendant, merely by reason of being an officer or trustee of this corporation, became possessed of knowledge of the fact that the company was not authorized to transact business, and that he incurred liability as a stockholder after he acquired such knowledge. We think the charge is obnoxious to the objections made by the appellant. The court should not have said to the jury, "It matters not whether the full quota of stock was

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subscribed or not in this case," because that could be true only upon the hypothesis that the evidence showed such conduct on the part of the defendant as a trustee or officer of the corporation as would amount to a waiver on his part of the defense that the whole capital stock had not been subscribed; and whether or not the evidence warranted such a conclusion was a question to be determined by the jury under proper instructions by the court. But as the evidence was such that the jury would not have been justified in finding that the whole of the capital stock was not subscribed, it would seem that the instruction complained of was not so prejudicial to appellant as to alone constitute a ground for a reversal of the judgment.

The appellant alleged in his answer that he was employed by the Seattle Insurance Company as its attorney, and that the said company, for and in consideration that he would advise said corporation, and perform general legal services for the same, issued to him one hundred shares of paid up stock of the said corporation, and that he accepted the same as paid up stock in full payment of legal services rendered and thereafter to be performed, and that he had received no other compensation whatever for said legal services so rendered, and that he performed said services so required and demanded of him, and that said shares of stock were not subject to any call or assessment. The respondent replied to this alleged defense by a general denial. Upon the trial the plaintiff undertook to hold the defendant liable for the amount of the certificate, and adduced evidence to show that no consideration whatever was given therefor to the insurance company, and that the same was not issued as paid up by authority of the corporation.

It appears from the record before us that this certificate purported upon its face to be paid up stock of the com-

pany, but no record of its being in any respect different from the ordinary assessable shares of stock appeared upon the company's books. The defendant requested the court to charge the jury that this certificate of one hundred shares should be considered as paid up and non-assessable, which instruction the court refused to give, but submitted to the jury the determination of the question whether it was issued for services rendered by defendant as alleged in his answer (in which event they were directed to find for the defendant), or whether it was marked paid up without any authority, but simply by virtue of an agreement entered into by certain of the trustees, one of whom was the defendant, that it should be so designated upon its face, while in fact it was considered as a gift or promoter's fee, in which latter event the jury were instructed, in substance, that the fact that the certificate was marked paid up did not make it such, but the defendant would be liable to pay for the stock notwithstanding such secret agreement. •

The appellant earnestly insists that the court erred in not charging the jury as requested, and he argues that inasmuch as the certificate was shown to be marked upon its face as fully paid up, the contrary could not be shown in this action, and the court was bound to recognize it as being just what it purported to be on its face, and should have so instructed the jury. The principle upon which the appellant relies, that a corporation after issuing its stock as paid up stock, and declaring it to be so, cannot subsequently repudiate its agreement, and proceed at law to collect the unpaid portion of the stock at par value, seems to be well established, and generally recognized by the courts. Cook on Stock and Stockholders (3d ed.), § 36; *Scovill v. Thayer*, *supra*.

In *Scovill v. Thayer*, *supra*, the subscribers of stock of an incorporated company paid twenty per cent. on their

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shares, and entered into an agreement with the company that no further assessments should be made thereon, and certificates for full paid shares were issued to them, and their accounts on the company's books were credited with the amounts paid, and the unpaid balance was credited to the subscriber by "discount," and their accounts with the company thus balanced. Upon this state of facts the court held that the agreement was in equity void as to creditors, and that no action at law could be maintained against a stockholder to recover upon his unpaid subscription of stock until the said agreement was set aside as being in fraud of creditors. In the course of the opinion the court said:

"It is conceded to have been the contract between him [defendant] and the company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the company this was a perfectly valid agreement."

In the present case, however, the agreement set up in the answer is not conceded, but is specifically denied. The substance of the appellant's defense, as to the one hundred shares of stock, was that the consideration therefor was paid by services which he had performed for the company in pursuance of an agreement entered into between the company and himself, and we think the question raised by plaintiff's denial was rightfully submitted to the jury for determination. If the stock was issued to appellant as fully paid, in consideration of services performed by him, as he alleged, he was not liable to pay any assessments thereon, and the court in effect so charged the jury. But whether it was so paid for was the very question to be determined, and this being so, the authorities cited by appellant in support of his contention are not fully applicable here.

The objection that the court gave inconsistent instruc-

tions to the jury is, we think, well taken. The jury were charged as follows:

“The court instructs the jury that if they find from a preponderance of the evidence that the Seattle Insurance Company was insolvent, and that the defendant is the owner of stock on an unpaid subscription to the capital stock of said insurance company, then in such case the defendant would be liable in this case for the full amount of the stock of said company held by the defendant at the time of the commencement of this action, less the amount that he paid thereon; in other words, in such case he would be liable for all unpaid stock held or subscribed for at that time.”

Subsequently the court further charged the jury in effect that defendant was not liable to pay the whole of the unpaid balance of his subscription unless the evidence showed that it was necessary for him to pay the same in order to discharge the debts and liabilities of the corporation. As both of these instructions could not be correct, the court clearly committed error in thus giving them to the jury. According to our view of this case the action was brought to recover the whole amount unpaid on the stock held by the appellant and which was declared to be due and payable by order of the court, sitting as a court of equity, and it was therefore improper to submit to the consideration of the jury the question whether or not the whole of said amount was necessary for the payment of the debts of the company. That question, as we have already intimated, had been determined by competent authority before the beginning of this action, and the receiver had been authorized to collect whatever amount remained unpaid upon subscriptions to the capital stock of the corporation. Upon this theory of the case, the first of these instructions was correct, but the second and erroneous one was not thereby cured, and it may have been the more influential of the two upon the minds of the jury.

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We perceive no error on the part of the court in permitting the bookkeeper and the secretary of the company to state the aggregate indebtedness of the corporation, as shown by its books, without introducing the books themselves in evidence, nor in permitting the introduction of written proofs of losses made by various policyholders. The liabilities of the company can hardly be definitely ascertained from the evidence, and it may be true, as claimed by the appellant, that it was not necessary to make a call for the whole amount of the unpaid subscription, but that is not a question for us now to determine. But of one thing we feel thoroughly satisfied, and that is, that the appellant should have had notice of the assessment, as provided by law, before this action was commenced against him. Although he became indebted to the corporation to the amount of his subscription at the time he subscribed for his stock, he was under no obligation to make payment until properly notified of the amount required, and the want of such notice would alone have constrained us to reverse the judgment, but in view of a possible new trial, we have endeavored to point out all other errors deemed material appearing of record.

The judgment is reversed, and the cause remanded to the lower court with instructions to sustain the defendant's demurrer to the complaint.

DUNBAR, C. J., and SCOTT, STILES and HOYT, JJ.,
concur.

8	686
12	146
8	686
22	542

[No. 1224. Decided May 17, 1894.]

THE CITY OF FAIRHAVEN, *Appellant*, v. E. L. COWGILL
et al., *Respondents*.

OFFICIAL BONDS—ALTERATION—DISCHARGE OF SURETIES—ACTION
 ON BOND—EVIDENCE—RATIFICATION.

In an action upon an official bond, the bond may be introduced in evidence without first explaining an evident alteration in a material part of the instrument.

Under the plea of a general denial, in an action upon a bond, evidence is admissible to show an alteration in the instrument after its execution. (DUNBAR, C. J., dissents.)

Where the bond of a city official has been altered after its execution by erasing therefrom the name of one surety and substituting therefor the name of another person, the sureties who do not consent to the alteration are thereby discharged; and the fact that the bond is entrusted to the official for delivery to the city does not make him the agent of the sureties to such an extent as to bind them for changes made by him, nor charge them with fraud on account thereof.

Although an official bond is executed charging the sureties with separate and limited liabilities, in accordance with the provisions of Gen. Stat., §2911, yet such fact does not alter the rule that sureties who do not consent to the release or withdrawal of a co-surety are entitled to a discharge from liability on the bond.

The fact that sureties upon an official bond, immediately after the discovery of a defalcation by their principal, unite with a co-surety, who had been substituted without their knowledge in place of another surety, in an endeavor to hold the money of the principal upon deposit in a bank, does not amount to a ratification of the altered bond.

Appeal from Superior Court, Whatcom County.

James H. Detrick, and Albert Sherman, for appellant.

Kerr & McCord, for respondents.

The opinion of the court was delivered by

STILES, J.—One W. S. Parker was, during the year 1891, the city marshal of the city of Fairhaven, a city of

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the third class. At the time of his appointment Parker was required to give a bond for the faithful performance of his duties in the sum of \$10,000. A bond was prepared in the proper form, with Parker as principal and respondents Cowgill and Huntoon and one Wilson as sureties. The principal was bound in the penal sum of \$10,000, and the sureties each in the sum of \$3,333.33. The obligation was joint and several. The bond was presented to the council for approval, but upon the suggestion of bondsman Wilson that it would be a breach of propriety for him, while he was mayor of the city, to be a bondsman for the marshal, it was agreed that the bond should be returned to the marshal, and a new bond prepared and submitted. The bond then before the council appears to have been withdrawn and the name of Wilson carefully erased from the body of it and the signature as well, and the name of Pierce Evans substituted, after which the bond was resubmitted to the council and approved and filed.

The respondents Cowgill and Huntoon had no knowledge of the change in the sureties until after the events which were the occasion for this action had transpired. The body of the bond was written with a typewriter, including the names of the sureties, and when the erasure of Wilson's name was made, Evans' name was substituted with a pen. The signature of Wilson was, of course, written with ink, and the name of Evans was written over the erasure, with ink, also. That there had been erasures in both places was clearly evident from an inspection of the paper.

After the marshal had misappropriated funds of the city in his hands to the amount of over \$10,000, and had absconded, this action was brought upon the bond against Parker and the three bondsmen, of whom Cowgill and Huntoon alone were served. The complaint alleged the execution and delivery of the bond in the usual manner

and included in it a verbatim copy of the instrument. The answer contained a denial of each and every allegation of the paragraph which alleged the execution and delivery of the bond. Upon the trial, the plaintiff, after proving the signatures attached to the bond, offered it in evidence. This offer was objected to, but the court overruled the objection and admitted the bond in evidence. The action of the court in not requiring the plaintiff to explain the evident alteration in the material part of the instrument, before allowing it to be received, is supported by *Wolferman v. Bell*, 6 Wash. 84 (32 Pac. 1017); *Yakima National Bank v. Knipe*, 6 Wash. 348 (33 Pac. 834); *Murray v. Peterson*, 6 Wash. 418 (33 Pac. 969).

The first material point urged by the appellant city is, however, that the court permitted the respondents to show the facts concerning the execution of the bond, and particularly that the name of Wilson had been erased from it and that of Evans substituted without their knowledge or consent, under the denial of the answer; the claim being that these facts should have been specially pleaded. This point brings up the question of what is provable in such a case under what is substantially a general denial of the execution and delivery of the bond.

It was incumbent upon the appellant to show that the respondents had executed and delivered the particular bond upon which the suit was brought. On the other hand, it was the privilege of the respondents to show, under the form of denial made in the answer, any fact which tended to disprove the ultimate conclusion that they had executed and delivered the particular bond offered in evidence. While it is true that under the code facts are to be pleaded, it is also true that the same code recognizes and provides for denials, both general and specific. A general denial under the code is scarcely recognizable from the plea of the general issue at common law, and the same

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Kind of proof is admissible under the one as under the other. *Griffin v. Long Island R. R. Co.*, 101 N. Y. 348 (4 N. E. 740).

This practice in admitting proofs is commonly applied to cases of altered instruments. *Smith v. United States*, 2 Wall. 219; *Cape Ann National Bank v. Burns*, 129 Mass. 596.

The admission of the evidence mentioned was therefore proper, since it tended to show, not that the respondents had never voluntarily signed, but that they had neither executed nor delivered the bond upon which Evans' name was found as surety.

The next question which occurs is, as to the effect to be accorded to the facts proven. Appellant suggests that it was a fraud upon the city for respondents to permit an altered bond of this kind to be delivered to the city at all, and cites some cases from Illinois and elsewhere, where a negotiable instrument coming into the hands of an innocent purchaser was held to bind the maker of the original instrument in its altered form, although the alteration had been made without the knowledge of the maker; it being there held that because the maker had allowed his note to go into circulation with blanks, so that forgery could be perpetrated without its giving rise to suspicion in the mind of an innocent purchaser, the person thus careless should suffer the consequences rather than the one who was without fault. *Stoner v. Millikin*, 85 Ill. 218; *Comstock v. Gage*, 91 Ill. 328.

But the difference between such cases and this one scarcely needs pointing out to be made perfectly plain. Here the bond was filled up with the name of the person whom respondents supposed would be their coobligor, and they executed and delivered it to the city with the expectation and reliance that it would remain in the condition in which it left their hands. They never saw it afterwards.

The city council had full control of the matter, saw the bond when it was laid before that body at its first presentation, and again after the name of Wilson had been erased. The face of the instrument showed for itself that it had been altered, both in its body and in the signature, and the council, as agent for the city, was bound to take notice of its changed condition. It is true that respondents had entrusted the bond to the marshal and made him their agent to deliver the bond which they had executed, but they did not make him their agent to make any changes therein, either in the material part of its obligations or in the names of the persons who were to be bound thereby; and they did nothing which, under the broadest construction, could be considered as in the least fraudulent. A bond altered in this manner has the effect to discharge those sureties who did not consent to the alteration. *Smith v. United States*, *supra*; *United States v. O'Neill*, 19 Fed. 567. See the discussion of these points in *King County v. Ferry*, 5 Wash. 536 (32 Pac. 538).

But it is maintained that under the law of this state, which permits sureties to charge themselves with separate limited amounts, and under the language of this bond which obligated each of the sureties for \$3,333.33, as a joint and several obligation, the legal effect of the bond would be that each surety was separately liable for the limited amount as though he had executed a separate bond; and, inasmuch as the total default of the marshal was more than the gross penalty of the bond, the liability of each surety extended to the full amount of his obligation, and it made no difference whether one or more of the original sureties withdrew or was discharged.

The statute in question, Gen. Stat., § 2911, is merely permissive in its language. When the penal sum of any official bond amounts to more than \$2,000, the sureties may become severally liable for portions not less than \$500 of

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such penal sum, provided that in the aggregate there are at least two sureties for the whole penal sum. This provision was doubtless made in deference to the fact that it is sometimes difficult to procure sureties who can qualify, or are willing to make themselves liable, for the principal of a large bond. But the privilege thus accorded to sureties does not seem to have been coupled with any condition which would show that they are thereby to be deprived of any of their rights under the general rules of law governing such matters. One of the principal reasons why sureties have been held discharged in cases where one or more of them have been permitted to retire from the obligation without the knowledge of the others, is that sureties are peculiarly entitled to the right of contribution among each other. This right is equitable in its nature and has been carried to great lengths by the courts. A general discussion of this subject will be found in Brandt on Suretyship and Guaranty, chap. 11; from which it will appear that sureties for the official conduct of an officer, even though they might have made themselves liable by separate bonds, and without knowledge on the part of one that another was so bound, would still be liable to each other for contribution in case of a default on the part of their principal. For the purpose of enforcing the contribution it makes no difference whether the bond be a joint and several, or simply a several, obligation. The right of one to have all the others who are equally bound with himself contribute their proportion of the loss which may be sustained by reason of the default of the principal still exists. Therefore, there is ground for the claim of respondents that Wilson, who was the man whom they chose to be their co-obligor, and upon whom they relied to share such loss as they might incur by reason of the marshal's default, should continue in that position, or that if he were discharged they should be discharged also.

Under the general denials of the answer it was doubtless error for the court to admit testimony concerning the comparative responsibility of Wilson and Evans, both because the facts were not pleaded and because the evidence was immaterial, since the law fully protected the respondents by discharging them from their liability, whether Evans was responsible or not. But this error was immaterial, because the legal effect of the alteration of the bond was to discharge the respondents without regard to whether Evans was equally responsible with Wilson or not.

There remains to be considered but one matter, viz., the claim of appellant that there was a ratification of the bond by the respondents after the name of Evans had been substituted for that of Wilson. After the defalcation of the marshal, and his departure, it was some two weeks before the state of his accounts became known. Investigation showed that he was short upwards of \$10,000, and that this bond was in existence. Respondents, by some means, were then made aware for the first time that Evans was their coöbligor. They also learned that a sum of money was credited upon the books of one of the local banks to W. S. Parker. Knowing themselves to have signed the bond, they, with Evans, endeavored to secure the money in the bank for their benefit in case their liability should be established. The bank acceded to their demands, and for a few days Parker's balance was formally subject to their control. But upon taking legal advice, and upon inspection of the bond, they became satisfied that they were not legally bound by its provisions, and they relinquished all claim to the bank balance, and from that time denied their liability. The fact of their interference with the deposit to Parker's credit is claimed to have amounted to a ratification of the bond with Evans as co-surety.

Upon this point it might be stated as a conclusive answer to the proposition that the action of respondents

May, 1894.] Dissenting Opinion—DUNBAR, C. J.

amounted to a ratification, that the court submitted that question to the jury and their verdict in that respect ought to stand. But were it otherwise, we do not think the fact proven tended in any manner to show ratification. The default had occurred and the principal had absconded and the action of the respondents in endeavoring to protect themselves from what they feared might be a heavy liability ought not, under such circumstances, to be charged to them as ratification, unless it should be made to appear that they intended it to operate with that effect. Up to that time it did not appear that the city had made any claim upon them, or that their action was anything else than such as men unversed in the law governing sureties might reasonably take, without its being charged against them that they were intending to admit the full measure of their apparent liability on the bond.

For these reasons the judgment will be affirmed.

HOYT, ANDERS and SCOTT, JJ., concur.

DUNBAR, C. J. (*dissenting*).—I am unable to conceive how, under the provisions of our code, the question of the alteration of the bond can be put in issue by a general denial, which in this case is equivalent to the plea of *non est factum*. The object of the code was to simplify the pleadings, and to notify the parties litigant what facts are expected to be proven in the trial of the cause. In this case, if the fact was that the instrument had been changed after it was executed, and the defendants intended to rely on that fact, they should have alleged it, and should not have alleged something that was misleading, and that absolutely failed to notify the plaintiff what the character of the defense was. In other words, under both the letter and spirit of the code, facts should be pleaded instead of fictions. This was the doctrine announced by this court in *Distler v. Dabney*, 3 Wash. 200 (28 Pac. 335), and a close

adherence to the doctrine announced in that case would wonderfully simplify the administration of the law and prevent frequent miscarriages of justice. For this reason I am compelled to dissent to the majority opinion.

[No. 1229. Decided May 17, 1894.]

F. X. PREFONTAINE, *Executor of the Last Will and Testament of Margaret Harmon, deceased, Respondent*, v. MAURICE McMICKEN, *Administrator de bonis non of the Estate of Sarah M. Renton, deceased*, AND JOHN A. CAMPBELL, *Executor of the Last Will and Testament of William Renton, deceased, Appellants*.

PARTY WALL—ACTION FOR COST—EVIDENCE.

In an action for the recovery of the cost of construction of one-half of a party wall, the testimony of the architect as to the proportion such party wall bore to the cost of the whole building is *prima facie* sufficient to establish its cost.

In such a case, the testimony of the architect that one-half of the cost of the construction of a party wall had not been paid by the party who contracted to pay it, is sufficient *prima facie* evidence to establish non-payment.

In an action against the parties to a party wall contract proof on the part of the plaintiff that ownership in the land charged with the party wall still continued in the defendants, who were the contracting parties, is unnecessary, as want of ownership is more properly a matter of defense.

Appeal from Superior Court, King County.

Burke, Shepard & Woods, and Struve, Allen, Hughes & McMicken, for appellants.

Bausman, Kelleher & Emory, for respondent.

The opinion of the court was delivered by

ANDERS, J.—This action was brought to recover half the alleged cost of the erection of a certain brick wall which had been erected in pursuance of a party wall agreement between plaintiff's testator and the defendants' decedents. The terms of this agreement were that if the wall should be erected by either of the parties thereto as specified in the contract the other parties would, if they should afterwards make use of the wall by the erection of a building on their lot, pay one-half of the actual cost of such erection upon being notified of the amount thereof by the party who had caused the wall to be erected. Said contract contained a stipulation that the covenants thereof should run with the land. These matters were set out in detail in the contract, but it is not necessary to further specify them for the purposes of this opinion.

Upon the trial of the cause the defendants, though present in court, contented themselves with making objections to the proof offered on the part of the plaintiff, and a cross examination of his witnesses, and made no effort to contradict the case as made by the plaintiff by any affirmative proof. After the proofs were all in, they contested the right of the plaintiff to recover on four grounds:

1. That the cost of the party wall was not shown by definite and competent evidence.
2. That there was no competent evidence of the furnishing of a statement of its cost to the decedents of the respective defendants, or either of them.
3. That it was not shown that the wall was used by the decedents of the respective defendants, or either of them, or that the half lot lying north of the plaintiff's lot and of the party wall was owned by the defendants' decedents, or either of them, when the party wall was used in the course of the erection of a building thereon.

4. That non-payment of the sum claimed by the plaintiff was not proved.

As to the first point it is contended that the proof offered on the part of the plaintiff tended only to show what would be a reasonable price for the erection of the wall in question, and that it was not sufficient to establish the fact that the actual cost thereof was the certain sum for the half of which the action was brought. The testimony in that regard was not as full and clear as it might have been, but when taken in connection with all the surroundings we think sufficient facts were shown to establish a presumption that the actual cost of the wall was equal to double the amount for which the action was brought. It would be a very unusual thing for one constructing as a part of her building a party wall, as did the plaintiff's testator under the contract in question, to construct such wall under a separate contract so that the exact cost could be stated as a separate proposition, uninfluenced by its connection with the building as a part of which it was erected. The usual practice would be to let the contract for the erection of the whole building, including the wall, and then determine the cost of the wall by finding out what proportion its erection bore to that of the whole building. By such a course the other party to the party wall contract could hardly be injured, and would in most cases be largely benefited, as, by having the wall constructed as a part of the whole building, its cost would very likely be less than it would if constructed as a separate job. Assuming that this would be a proper way to determine the cost of the party wall, we think the testimony of the architect was sufficient to *prima facie* establish the fact that its actual cost to plaintiff was equal to double the amount for which the action was brought.

As to the next question, there was, in our opinion, sufficient proof to so establish the fact of service of notice of

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the cost of the wall upon the plaintiff's decedents as to require of them a showing that such notice had not been received to enable them to escape liability on that account.

In regard to the third point made by the appellants it is only necessary to say that the title to the property being in the defendant's decedents at the time of the making of the contract, the plaintiff had a right to assume that that ownership was continuing at the time the use of the wall was made, and that if such was not the fact it was matter of defense. That the ownership of real estate once shown to be in a certain party will be presumed to have continued until the contrary is shown, may be stated as a general proposition, and especially should that be held to be the rule under the circumstances disclosed by this record, where the parties were all in court and defendants in a position to have proved that they had parted with the ownership, if such had been the fact, much more easily than could the plaintiff have shown the contrary.

As to the question of the proof not showing that the claim had not been paid, it would seem that the testimony of the architect should be held to have *prima facie* established the non-payment, if it was necessary for the plaintiff to prove it at all, as to which there may be question, the general rule being that the fact of payment is matter of defense. It is not, however, necessary that we should decide as to whether or not that was applicable to this particular case, as we think there was enough proof tending to show that the amount had not been paid to put the defendants upon their proof as to that fact.

Such being our determination as to the questions of fact raised by the appellants in their brief, it is not necessary that we should discuss any other questions presented.

The judgment must be affirmed.

DUNBAR, C. J., and SCOTT, HOYT and STILES, JJ., concur.

[No. 1190. Decided May 19, 1894.]

JOSEPH HERSNER, *Respondent*, v. B. MARTIN AND MARY MARTIN, *Appellants*.

MORTGAGES—FRAUD—EVIDENCE—EXHAUSTION OF OTHER SECURITIES—RIGHTS OF MORTGAGEE.

A charge of fraud in the procurement of a mortgage is not established by proof that the mortgagors had but a limited knowledge of the English language, and that they did not intend to give any mortgage on the land, but were led to believe they were executing an assignment of certain notes of other parties to the mortgagee in full payment for the land, when it is shown that the mortgagee never had possession of such notes, and that the interest of the mortgagors therein amounted to but \$700, while the value of the land conveyed by the mortgagee was \$1,250.

A mortgagee to whom other security is given in addition to his mortgage is not compelled to exhaust such security before relying upon the mortgage executed to him.

Appeal from Superior Court, Spokane County.

Prather & Danson, for appellants.

Jones, Belt & Quinn, for respondent.

The opinion of the court was delivered by

SCOTT, J.—The respondent brought this action to foreclose a mortgage executed to him by the appellants to secure the purchase price for certain real estate conveyed by respondent to appellants. At the time the said real estate was purchased and the mortgage executed, appellant B. Martin owned an interest in three notes given by one Reynolds, which were also secured by a real estate mortgage. These notes had been obtained by said Martin from one McGinnis, and had been left in his hands by Martin to secure the balance of the purchase price, amounting to something over \$700. The three notes amounted to about \$1,600. At the time appellants executed the mortgage

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upon which foreclosure was sought in this action, the appellant B. Martin also assigned to the respondent his interest in said three notes purchased by him from McGinnis, and which were then held by McGinnis as security for the purchase price thereof as aforesaid. Appellants answered to the complaint, setting up the assignment of these three notes, and alleged that the same were assigned in full payment for the real estate obtained from the respondent, and they denied having executed the mortgage thereon which respondent was seeking to foreclose, and alleged that the same was obtained by fraud. Respondent obtained judgment foreclosing said mortgage, and this appeal was taken.

The main contention is one of fact. Appellants contend that the court should have found in their favor upon the issue of fraud. It is contended by them that they were of foreign birth, and only had a very limited knowledge of the English language, not enough to enable them to transact business of that kind intelligently, and that the respondent took advantage of their ignorance in the premises, and fraudulently procured them to execute the mortgage in question. But, after an examination of the proofs, we are satisfied with the findings of the court in the premises. The agreed price of the real estate conveyed by the respondent to appellants was \$1,250, and the interest of appellant B. Martin in the mortgage notes which he claimed were transferred by him to respondent in full payment for said real estate was considerably less than that, and is a strong circumstance sustaining the claim of the respondent that said assignment was only given to him as additional security for the purchase price aforesaid.

It is further contended by appellants that the respondent could not bring suit to foreclose the mortgage aforesaid without accounting for the notes assigned to him by B. Martin; but there was nothing to show that the respondent ever had possession of said notes, or had ever received

anything thereon. They were in the hands of another party, as stated, and the respondent contends that he had a right to waive this security, and rely solely upon the mortgage executed to him as aforesaid, and his contention in this respect must be sustained.

Judgment affirmed.

DUNBAR, C. J., and STILES, HOYT and ANDERS, JJ.,
concur.

8	700
12	487
8	700
122	86
122	67
8	700
35	513
8	700
39	409

[No. 1332. Decided May 19, 1894.]

WATSON ALLEN, *Respondent*, v. W. T. FORREST, *Commissioner of Public Lands of the State of Washington*, *Appellant*.

TIDE LANDS—VESTED RIGHTS—AUTHORITY OF A STATE TO ALTER
LAW GIVING PREFERENCE RIGHT OF PURCHASE.

The act of March 26, 1890, giving the improver of tide lands prior to that date a preference right of purchase does not constitute a contract between the state and the improver giving him any vested rights in such lands, but the right of purchase given him is merely a privilege which he has a right to exercise only while the law remains in force; and in case such privilege has not been exercised, the state may, by a subsequent law, provide for the use and occupation of the tide lands for other purposes without its being an impairment of any obligation due to the prior improver thereof.

Appeal from Superior Court, King County.

W. C. Jones, Attorney General, and *Semple & Hale*, for
appellant:

The plaintiff's theory is, that his right to purchase is an existing interest in the land; but we contend that there are no existing vested rights as against the state; even in the improvers who have kept up or renewed their structures

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Argument of Counsel.

on the faith of the law of March 26, 1890. They and their assigns deal with an inchoate right in full view of the contingency that the legislature may destroy its foundation without prejudice. It is a mere tender, that can be withdrawn at any time before execution. The right given to remain upon the land is not a grant, but a mere license, and can be revoked without notice by the legislature. *Dolittle v. Eddy*, 7 Barb. 74; *Stone v. Sprague*, 20 Barb. 509. A license cannot, under any circumstances, become irrevocable by estoppel, when the effect would be to create an interest in land. *Jackson, etc., Co. v. Railroad Co.*, 4 Del. Ch. 180; 2 Wash. Real Prop. 669. A mere expectation of future benefits or interest, founded upon the continuance of existing general laws, is not a vested right. *Clarke v. McCreary*, 12 Smedes & M. 347; *Merrill v. Sherburne*, 1 N. H. 213; Cooley, Const. Lim. 333, 345. A grant of a mere license or gratuity, which imposes no new duty or additional burden, and is without consideration, is revocable at the will of the legislature. *Philadelphia, etc., Ry. Co.'s Appeal*, 102 Pa. St. 123; *Derby Turnpike Co. v. Parks*, 10 Conn. 522; *Gregory v. Shelby College*, 2 Metc. (Ky.) 589; *State v. Morris*, 77 N. C. 512. So long as the contract remains executory it may be revoked by the legislature, if not founded on an executed consideration. *Trustees v. Rider*, 13 Conn. 87; *Lumber Co. v. Commonwealth*, 100 Pa. St. 438; *Slack v. Railroad Co.*, 13 B. Mon. 1. It makes no difference if the efforts of plaintiff to accept are defeated by defendant. *Crocker v. Railroad Co.*, 24 Conn. 249. The claim of plaintiff under the law of March 26, 1890, is not nearly so strong as that of a claimant under the preëmption laws of the United States and of the different states that own uplands within their borders, and it is settled law that the latter have no vested rights and no contract rights until the processes of acquisition have matured. *Frisbie v. Whitney*, 9 Wall. 187;

Hutchings v. Low, 15 Wall. 77; *Campbell v. Wade*, 132 U. S. 34.

Arthur, Lindsay & King, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—The plaintiff, claiming right to purchase certain tide lands under the act of March 26, 1890, brought his action against the defendant, W. T. Forrest, commissioner of public lands, to restrain him from entering into a contract with one Eugene Semple, who had made application under the act of March 9, 1893, entitled “An act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract, providing for liens upon tide and shore lands belonging to the state, granting rights-of-way across lands belonging to the state.” The complaint set up the necessary qualifications of the plaintiff, under the act of March 26, 1890. Defendant demurred to the complaint; the demurrer was overruled, and the defendant, resting upon his demurrer, refused to plead further. Judgment was awarded the plaintiff, and defendant appeals to this court.

The sole question to be determined is, does the law of March 26, 1890 (Laws 1889–90, p. 431), entitled “An act for the appraising and disposing of the tide and shore lands belonging to the State of Washington,” constitute a contract between the state and the class of privileged persons mentioned in said act, which the legislature cannot annul or change by a subsequent enactment. Or, in other words, did the said class of privileged persons obtain any vested rights in the tide lands of the state by reason of said enactment, and is the said act of March 9, 1893 (Laws, p. 241), an impairment of the obligation of a contract between the state and the said privileged class of persons.

It has been the uniform holding of this court that the ownership of the tide and shore lands is in the State of

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Washington; and the power to deal conclusively with them is in the state, subject only to the power of the federal government to prevent the obstruction, impairment or injurious modification of navigable waters. See *Eisenbach v. Hatfield*, 2 Wash. 236 (26 Pac. 539), and all subsequent cases on that subject.

The attorneys for both appellant and respondent have prepared elaborate and painstaking briefs in this case, but it seems plain to us that the respondent obtained no vested rights whatever under the act of March 26, 1890; that no contract whatever was entered into between the state and the respondent, but that his right to purchase under the conditions named in the act was simply a privilege which he had a right to exercise only while the law remained in force.

We do not think that the cases cited by respondent in any manner sustain his contention. *Fletcher v. Peck*, 6 Cranch, 87, is a long and exceedingly interesting case. It is true that the court there decided that when a law is in its nature a contract, when absolute rights have vested in that contract, a repeal of the law cannot divest those rights. This doctrine, we take it, will not be disputed anywhere. But in that case there was an actual grant of lands made by the legislature. The court stated that the lands in controversy vested absolutely in the grantees; that the grant, when issued, conveyed an estate in fee simple to the grantee, clothed with all the solemnities which the law can bestow. The court also held that the grant in that case was a contract executed, and that the fact that the legislature which had passed the prior act had been stimulated to do so by and through corrupt means, would not justify a subsequent legislature in destroying vested rights which had grown up under the prior law and which involved innocent purchasers. There is nothing in that case, we think, that in any way sustains the contention of respondent.

In *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674 (6 Sup. Ct. 273), it was decided that a legislative grant of an exclusive right to supply water to a municipality and its inhabitants through pipes and mains laid in the public streets, and upon the condition of the performance of the service by the grantee, is a grant of a franchise and vests in the state in consideration of the performance of a public service, and after performance by the grantee is a contract protected by the constitution of the United States against state legislation to impair it. It will be seen that this was an executed contract, and that the decision was based upon the fact that the grantee had performed his part of the contract. *St. Tammany Water Works v. New Orleans Water Works*, 120 U. S. 64 (7 Sup. Ct. 405), is the same kind of a case, and the decision is based upon the principle announced in *New Orleans Water Works Co. v. Rivers*, *supra*.

People v. Board of State Auditors, 9 Mich. 326, was where, under an act to encourage the manufacture of salt in the State of Michigan, approved February 15, 1859, a bounty of ten cents per barrel had been offered to manufacturers, and afterwards, viz., on March 15, 1861, the law had been changed. It was held, on application for mandamus, that the manufacturers were entitled to the bounty on a certain number of barrels of salt which had been manufactured before the passage of the act of March 15, 1861. We hardly see how the law could have been construed in any other way, the only defense to the action being that the claim had not been presented until after the enactment of the new law.

Montgomery v. Kasson, 16 Cal. 189, is a case brought under the grant of swamp lands. The court there held that the grant was a grant upon condition precedent. The grant was to certain individuals on condition of certain drainage ditches and canals being constructed; but the case specially recites that the said grantees have, pursuant

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to said act, commenced the construction of said canals provided for by the said act.

“It is a contract,” says the court, “by which the state grants certain lands upon condition of work to be performed, the grant to take effect when the work is done. It is a contract by which valuable rights may be acquired absolutely, upon the performance of the acts specified as the consideration moving to the state. The grantees, as appears from the evidence in the record, and as found by the referee, entered upon the performance of those acts in the fall of 1857; they then employed an engineer, and surveyed the line of the proposed canals; and in February following commenced the work of excavating one of the canals, and continued the same, without cessation, until June, 1858. They thus brought themselves within the terms of the first section, providing for the commencement of ‘the canals, or some one of them,’ within one year after the passage of the act.”

Under this statement of facts the court holds that by part performance of the contract the grantees had acquired rights with which the legislature could not interfere by subsequent enactment.

But the case at bar is altogether different. The respondent has done nothing. It is true that he has remained in possession of the lands and of the improvements, but he was in possession at the time of the passage of the law. He has made no application to purchase the lands. He has made no payments. It is not even known by the state that he desires to avail himself of the privilege which he had under the law of March 26, 1890, to purchase. He has entered into no contract with the state, and could not be bound to the performance of any contract. He has made no agreement to bind himself or to do anything whatever in the premises. No action for specific performance would lie against him. There is no mutuality whatever, and no other element of a contract between the respondent and the state. The ordinarily accepted defini-

tion of a contract is an agreement between two or more parties to do or not to do a particular thing. This case does not fall within this or any other definition of a contract.

It would be unfortunate indeed if the tide lands of the state were to be tied up awaiting, for an indefinite time, the movement of a class of persons who, under the first law that was passed in relation to them, were privileged to purchase them under conditions expressed, and that the state should not be allowed to change the conditions of its proposals at any time before the proposals were accepted by those in whose interest the law was enacted. Such a theory has never been sustained by the law in relation to lands of any character. On the contrary, it has been held in *Frisbie v. Whitney*, 9 Wall. 187, that occupation and improvement on the public lands with a view to preëmption do not confer a vested right in the lands so occupied; and such a vested right under the preëmption laws is only obtained when the purchase money has been paid and the receipt of the proper land officer given to the purchaser; that until this is done it is within the legal and constitutional competency of congress to withdraw the land from entry or sale, though this may defeat the imperfect right of the settler. And, adopting the opinions of Attorneys General CUSHING and BATES, the court says:

“Persons who go upon the public land with a view to cultivate now and to purchase hereafter possess no rights against the United States, except such as the acts of congress confer; and these acts do not confer on the preëmtor, *in posse*, any right or claim to be treated as the present proprietor of the land, in relation to the government. . . . A mere entry upon land, with continued occupancy and improvement thereof, gives no vested interest in it. It may, however, give, under our national land system, a privilege of preëmption. But this is only a privilege conferred on the settler to purchase land in pref-

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erence to others. His settlement protects him from intrusion or purchase by others, but confers no right against the government.”

This, we think, is plainly analogous to the laws governing the sale of tide lands. A privilege was conferred upon the respondent by the law of March 26, 1890. That privilege was accorded him in preference to others to purchase the tide lands, and he would have been protected under the laws then in force against the intrusion or purchase by any other person, but no right was conferred upon him against the state. The case of *Frisbie v. Whitney*, *supra*, goes very far beyond the necessary holding in this case to reverse the judgment, for there it appears that something had been done by the applicant. The court says:

“The argument is urged with much zeal that, because complainant did all that was in the power of any one to do towards perfecting his claim, he should not be held responsible for what could not be done. To this we reply, as we did in the case of *Rector v. Ashley*, 6 Wall. 142, that the rights of a claimant are to be measured by the acts of congress, and not by what he may or may not be able to do, and if a sound construction of these acts shows that he had acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient.”

The same doctrine obtains in *Hutchings v. Low*, 15 Wall. 77. There it was held that a party, by mere settlement upon lands of the United states, with a declared intention to obtain a title to the same under the preëmption laws, does not thereby acquire such a vested interest in the premises as to deprive congress of the power to devise it by a grant to another party. That the power of regulation and disposition over the lands of the United States conferred upon congress by the constitution only ceases under the preëmption laws when all the preliminary acts prescribed by those laws for the acquisition of the title, including

payment of the price of the land, have been performed by the settler. That the legislation thus adopted for the benefit of settlers was not intended to deprive congress of the power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use.

In *Campbell v. Wade*, 132 U. S. 34 (10 Sup. Ct. 9), it was held that the statutes of the State of Texas, providing for the sale of a portion of the vacant and unappropriated public lands of the state, did not appear to confer upon a person making application under them for a survey of a part of said lands and paying the fees for filing and recording the same a vested interest in such lands which could not be impaired by the subsequent withdrawal of them from sale under the provisions of the later statutes; and the doctrine of *Frisbie v. Whitney* and *Hutchings v. Lono* was reaffirmed.

It seems to us that, under all authority, as well as on principles of sound public policy, it must be decided that the respondent obtained no vested rights under the act of March 26, 1890, and that the act of March 9, 1893, should not be construed as an impairment of any contract between the state and the parties who are privileged to purchase under the provisions of the act.

All the other questions raised in the brief are decided against the contention of respondent. The judgment will, therefore, be reversed and the cause remanded to the lower court with instructions to sustain appellant's demurrer to respondent's complaint.

ANDERS, STILES, HOYT and SCOTT, JJ., concur.

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limited liabilities, in accordance with the provisions of Gen. Stat., §2911, yet such fact does not alter the rule that sureties who do not consent to the release or withdrawal of a co-surety are entitled to a discharge from liability on the bond.—*Id.* 686

10. *Same—Ratification.* The fact that sureties upon an official bond, immediately after the discovery of a defalcation by their principal, unite with a co-surety, who had been substituted without their knowledge in place of another surety, in an endeavor to hold the money of the principal upon deposit in a bank, does not amount to a ratification of the altered bond.—*Id.* 686

See APPEAL, 17, 32; COUNTIES, 5, 7; MUNICIPAL CORPORATIONS, 4.

BOUNDARIES.

Conformity with Government Surveys. Where the custom of surveyors in laying out plats and in running lines is to make them conform to the nearest lines of the government survey, if such lines vary from the true lines upon which they should have been run, the boundary lines given in a deed of conveyance as running north and south and east and west will be construed as conforming with the variations in the nearest lines of the government survey.—*Tacoma Bldg., etc., Association v. Clark* 239

CERTIORARI.

1. *To Justice of Peace—Review by Superior Court—Appeal by State.* Where, in a criminal case, the defendant, after having been found guilty before a justice of the peace, has had the cause removed by certiorari to the superior court, which reversed the judgment of the justice of the peace, an appeal will lie on the part of the state to the supreme court, under the provisions of §1, subd. 7, Laws of 1893, p. 120. *State v. White* 230
2. *Same—In Criminal Cases.* Certiorari will lie, under Code Proc., §1621, for the removal of criminal actions from a justice of the peace to a superior court.—*Id.* 230
3. *Same—Retaxing Costs.* Where the only error committed by a justice of the peace in the trial of a criminal action was in taxing the costs under the provisions of a law which had been repealed, the superior court should, in reviewing said action in certiorari proceedings, retax the costs and affirm the judgment.—*Id.* 230

CERTIORARI—CONTINUED.

4. *Jurisdiction of Supreme Court—Amount in Controversy.* The supreme court has no jurisdiction to review the action of the superior court by means of certiorari proceedings when the original amount in controversy in the case does not exceed the sum of \$300, and the action does not involve the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute.—*State, ex rel. Hamilton, v. Superior Court*..... 271

See QUO WARRANTO, 1.

CHATTEL MORTGAGES.

1. *Unrecorded Mortgage—Sale of Property for Antecedent Debt—Priorities.* The holder of an unrecorded chattel mortgage given for a consideration passing between the parties at the time of its execution has no priority over one holding under a bill of sale of the same property, though the sale is in consideration of an antecedent debt, when the failure of the mortgagee to record his mortgage was due to an agreement between the parties made for the mortgagor's benefit.—*Hall v. Matthews* 407
2. *Validity—Possession by Mortgagee.* Where possession of goods is taken under a chattel mortgage thereof, the fact that the mortgage contains no affidavit as to its execution having been in good faith will not affect the rights of the mortgagee.—*Reed v. Bank of Commerce*..... 589
3. *Mortgage of Rolling Stock—Validity.* Under the laws of this state, Gen. Stat., §§1646 *et seq.*, a mortgage upon the real estate of a railroad, and purporting to cover the rolling stock also, does not bind the latter class of property, when the instrument is executed and recorded as a real estate mortgage, and does not comply with the formalities required in the execution of chattel mortgages.—*Radebaugh v. Tacoma & Puyallup R. R. Co.*..... 570

See SALE, 4.

COMMUNITY PROPERTY. See HUSBAND AND WIFE, 1, 2;
LANDLORD AND TENANT, 1.

CONSTITUTIONAL LAW. See CORPORATIONS, 1; CRIMINAL
LAW, 5; MUNICIPAL CORPORATIONS, 17; TAXATION, 7.

CONTINUANCE.

Absence of Attorney. The refusal of the court to grant a continuance because of the absence of one of defendant's attor-

CONTINUANCE—CONTINUED.

neys is not error, when it appears that one of his attorneys of record was present at the time the cause was called for trial, and that the cause had been regularly set for trial upon that day several days prior thereto.—*Zelinsky v. Price*..... 256

CONTRACTS.

1. *Award of County Printing.* The order of the board of county commissioners in accepting a bid for county printing, under the provisions of § 2936, Gen. Stat., does not constitute a contract with the bidder nor conclude the board from rescinding its order and making another award.—*State, ex rel. DeRackin v. Allen*..... 168
2. *Action on Contract for County Printing—Pleading.* In an action to recover for services in doing the county printing, a complaint is demurrable for want of facts, when it does not allege that the work was done by plaintiff or that he had any interest in the newspaper in which the official notices were published.—*Rathbun v. Thurston County*..... 238
3. *Same.* In such an action, the answer states facts sufficient to constitute a defense when it alleges that plaintiff sold his paper in which he had contracted to do county printing, and had refused and neglected to carry out and perform his contract, by reason of which defendant was compelled to enter into a contract with another to do the printing for said county, for the unexpired time covered by the contract with plaintiff, and that the printing for which plaintiff now sought to recover had been done by another under such subsequent contract.—*Id.*..... 238
4. *Same—Evidence.* In such an action, the plaintiff should be non-suited, when the evidence shows that he had sold the paper in which he contracted to do the county printing to another, and that the county commissioners refused to furnish him with any more notices for publication.—*Id.*.... 238
5. *Action on Contract—Instructions.* In an action upon a specific contract to furnish materials and services in the construction of an electric lighting system, for which the defendant agreed to pay a certain price "when the work has been completed and found to be in good working order," an instruction was erroneous which charged the jury that if the contract had been substantially performed and the materials retained, the plaintiff was entitled to recover.—*Edison, etc., Co. v. Navigation Co.*..... 370
6. *Same.* In such a case, an instruction was erroneous which told the jury, in substance, that, if the contract had been

CONTRACTS—CONTINUED.

- substantially performed, and was at the moment of its completion found to be in good working order, the plaintiff could recover, even although events succeeding the completion of the work established the fact that the result accomplished was not that contemplated by the contract.
— *Id* 370
7. *Same—Scope of Contract*. Where a contract contemplates the services of but one expert, the contractor cannot recover for the services of two experts which he put to work upon the job.—*Id* 370
8. *Subscription Contract—Construction*. Although an instrument given in consideration of the location of a foundry at a certain place may recite that the maker "agrees to subscribe" a certain amount, yet where the facts surrounding the transaction show that the instrument was delivered and received by the parties thereto as a subscription, the words "I agree to subscribe" must be construed to mean "I agree to pay."—*Strong v. Eldridge* 595
9. *Evidence—Parties*. When a contract arises by reason of an offer or proposal by one party which is accepted and acted upon by the other, the person to whom the offer or promise is actually made may be shown by extrinsic evidence, although not named in the instrument evidencing the contract.—*Id* 595
10. *Contracts of Foreign Corporation—Validity*. A contract with a foreign corporation cannot be repudiated on the ground that such corporation has not complied with the law relative to foreign corporations doing business in this state.—*Whitman Agricultural Co. v. Strand* 647

See CORPORATIONS, 4; DAMAGES, 1, 2; GOOD WILL; INTEREST, 2; LOGS AND LOGGING, 1; PUBLIC LANDS, 7.

CORPORATIONS.

1. *Transfer to Mortgagee—Preferences*. The transfer by an insolvent corporation of all its property to the mortgagee thereof is not such a preference over unsecured creditors as to constitute a fraudulent conveyance; nor is such transfer inhibited under the provisions of art. 12, §8 of the constitution, declaring that no corporation shall alienate any franchise so as to relieve the franchise, or property held thereunder, from the liabilities incurred in the operation, use or enjoyment of such franchise.—*Klosterman v. Mason County, etc., R. R. Co* 281

CORPORATIONS—CONTINUED.

2. *Promissory Notes of—Pledge of Stock to Secure—Corporation Creditor.* Although the note of a corporation may have been given without any consideration for its execution, a *bona fide* purchaser thereof for value, to whom certain shares of the capital stock of the corporation were assigned to secure its payment, is a corporation creditor.—*Stewart v. Gould*..... 367
3. *Stockholder—Power of Owner of All the Stock.* Although a stockholder, after a pledge of any or all of his stock, is, under § 1509, Gen. Stat., authorized to represent the same at all meetings and vote as a stockholder, and although he is the owner and holder of the balance of stock remaining after such pledge, yet he would not be authorized to transfer or dispose of the property of the corporation to secure an individual indebtedness to the prejudice of corporation creditors.—*Id* 367
4. *Foreign Corporations—Right to Transact Business.* Where a foreign corporation fails to register in compliance with the laws of a state, which merely impose a penalty for every day that business is carried on in the state without the corporation's having so qualified itself therefor, and there is no prohibition in the law against the transaction of business nor declaration that contracts entered into prior to such qualification shall be unlawful, the contracts entered into with such foreign corporation before it is authorized to transact business must be held binding.—*Edison, etc., Co. v. Navigation Co*..... 370
5. *Corporate Existence—Pleading and Proof.* Where the complaint alleges that defendant is a corporation organized and existing under the laws of the state, and the only answer of the corporation is a general denial, it cannot afterwards complain that there was no affirmative proof of its corporate existence.—*Garneau v. Port Blakely Mill Co*.... 467
6. *Subscriptions to Stock—Right of Receiver to Enforce.* The receiver of an insolvent corporation may bring a separate suit against a stockholder to recover any sum due upon his share of stock.—*Elderkin v. Peterson*..... 674
7. *Same.* In an action by the receiver of an insolvent corporation to recover upon unpaid subscriptions to its stock, the defendant cannot question the regularity of the appointment of the receiver nor the judgment of the court as to the necessity of collecting the unpaid subscriptions to capital stock.—*Id*..... 674

CORPORATIONS—CONTINUED.

8. *Same—Pleading.* In such an action a complaint does not state a cause of action, under Gen. Stat., § 1507, when it fails to allege that the defendant had notice of the call for assessments upon his stock, made by the receiver under the order of the court.—*Id.*..... 674
9. *Same—Instructions.* In such an action a charge to the jury that “it matters not whether the full quota of stock was subscribed or not in this case” is erroneous because it assumes that the evidence shows such conduct on the part of the defendant as an officer of the corporation as would amount to a waiver of the defense that the whole of the capital stock had not been subscribed.—*Id.*..... 674
10. *Same.* The fact that a certificate of stock purports on its face to be paid up stock of a corporation will not warrant the court in instructing the jury that the certificate should be considered as paid up and non-assessable, when the plaintiff enters a denial to such defense and introduces evidence showing that the certificate was not issued as paid up by the authority of the corporation.—*Id.*..... 674
11. *Same.* Where an action is brought to recover the whole amount unpaid on the stock of an insolvent corporation held by the defendant, and which had been declared to be due and payable by order of the court, sitting as a court of equity, it is error for the court to charge the jury that defendant is not liable to pay the whole of the unpaid balance of his subscription, unless the evidence shows that it is necessary in order to discharge the debts and liabilities of the corporation.—*Id.*..... 674

See ATTACHMENT, 2; CONTRACTS, 10.

COSTS.

1. *Action by Non-Resident—Security for Costs.* Where an action is instituted against several defendants by a non-resident plaintiff, he cannot, under Code Proc., § 844, be compelled to furnish a separate bond for costs to each defendant appearing and claiming such bond.—*Robinson v. Haller* 309
2. *Malicious Prosecution—Liability of Complaining Witness for Costs.* The superior court has no authority, upon the acquittal of a defendant in a criminal case, to enter judgment for costs against the complaining witness, although the court may find that the complaint is frivolous and without probable cause.—*Town of Ilwaco v. Miller*..... 449

COSTS—CONTINUED.

3. *Fees of County Clerk—Filing Transcript of Judgment of Justice of Peace.* The provision of Laws 1893, p. 425, requiring the party instituting any action or proceeding to pay a fee of four dollars when the cause is entered in the court, or when the first paper on his part is filed therein, has no application to the filing and entry of a transcript of a judgment of a justice of the peace in the execution docket of the county clerk.—*State, ex rel. Bittencouer, v. Gordon*... 488
4. *Garnishment Proceedings—Clerk's Fee.* A garnishment proceeding being but auxiliary to the principal action in which it is instituted, the plaintiff, on applying for the writ, is not required to pay the clerk's fee of four dollars, which the fee act provides must be paid by the party instituting an action or proceeding.—*Kelly v. Ryan*... 536

See CERTIORARI, 3; LOGS AND LOGGING, 4.

COUNTIES.

1. *Construction of Ditch—Taking Bond from Contractor.* The construction of a local ditch is not such a county improvement as to require the county commissioners to take a bond from the contractor, under Gen. Stat., §2415, for the protection of laborers.—*Wallace v. Skagit County*... 457
2. *Ratification of Invalid Indebtedness.* Under Laws 1893, p. 181, §1, provision is made for the ratification of such invalid county indebtedness only as was incurred prior to March 9, 1893, the date that said act took effect.—*Hunt v. Fawcett*... 396
3. *Same—Submission to Voters.* The joinder in one proposition for submission to the voters for ratification of indebtedness which cannot be validated with that which may be vitiated and renders nugatory the entire proceeding.—*Id*... 396
4. *Same.* Under Laws 1893, p. 181, §2, a proposition submitted to the voters of a county for the purpose of ratifying its invalid indebtedness is illegal, when it does not specify the dates at or between which the different items of indebtedness were attempted to be incurred.—*Id*... 396
5. *Funding Bonds—Validity.* Where county commissioners are authorized to issue bonds for funding indebtedness without an election being held therefor, the fact that the bonds are issued pursuant to an election will not affect the validity of the issue.—*Id*... 396
6. *Proceeds of Bonds—Cannot be Applied on Current Expenses.* A county is not authorized, under Laws 1889-90, p. 37, §3, after it has reached an indebtedness of one and one-half

COUNTIES—CONTINUED.

per cent. of the assessed valuation of its property, to borrow money upon an issue of bonds voted by the people and apply any of the proceeds to the redemption of its outstanding warrants within the one and one-half per cent. limit, for the purpose of issuing new warrants in their stead for current expenses.—*Id.*..... 396

7. *Sale of Bonds—Illegality of Commission.* The payment of a commission to the purchaser of county bonds is contrary to the provisions of the statute prescribing that such bonds shall not be sold at less than their par value.—*Id.*..... 396

8. *Removal of County Seat—Jurisdiction of County Commissioners.* The fact that the commissioners of a county have made an order, based upon a proper petition therefor, for the submission to the people of the question of removing the county seat to the town named in such petition, will not authorize them, under Gen. Stat., §§ 2458-61, to submit at the same election a proposition for its removal to a certain other town, when the petition for removal to the latter place contains the names of less than one-third of the number of people voting at the last preceding general election.—*Rickey v. Williams.*..... 479

See CONTRACTS, 1-4; EQUITY, 1, 2; GARNISHMENT; INJUNCTION, 2; INTEREST, 2; MANDAMUS.

CRIMINAL LAW.

1. *New Trial—Disqualification of Juror.* A hypothetical opinion expressed by a juror prior to a trial, that if what he had read about the case was true the accused ought to be convicted on general principles, is not alone sufficient cause for granting a new trial.—*State v. Gile.*..... 12
2. *Instructions—Bodily Injury.* Where the court in an instruction to the jury has correctly defined a deadly weapon as one likely to produce death or "great bodily injury," it is not error for the court later in the same instruction to refer to such deadly weapon as one likely to produce death or "an injury" upon the complaining witness, as the omission of the words "great bodily," in the second definition is not misleading to the jury nor contradictory of the first definition.—*State v. Rosener.*..... 42
3. *Same—Reasonable Doubt.* An instruction defining a reasonable doubt, which is possibly open to the objection that it recognizes the right of a jury to require less positive proof of facts in cases of minor importance than in those of a graver nature, is not prejudicial, when the instruction,

CRIMINAL LAW—CONTINUED.

- taken as a whole, defines such doubt as one which would make a man of common prudence pause or hesitate to act thereon.—*Id*..... 42
4. *Failure of Accused to Testify—Instructions.* Where the accused in a criminal prosecution fails to testify in his own behalf, it is the duty of the court, under § 1307, without an affirmative request therefor, to charge that no inference of guilt should arise against the defendant on account thereof.—*State v. Myers*..... 177
5. *Furnishing Accused with Copy of Complaint.* A justice of the peace is not required, under art 1, § 22 of the constitution, to prepare a copy of the complaint in a criminal action and deliver it to the accused, but the constitutional mandate is sufficiently complied with when the accused is given the complaint and told to make a copy of it if he chooses to.—*State v. White*..... 230
6. *Misconduct of Prosecuting Attorney.* Where the prosecuting witness in a seduction case takes her child to the witness stand, and it appears that this was done by direction of the prosecuting attorney solely for the purpose of exhibiting the child to the jury and of exciting prejudice against the defendant, such action is sufficient to entitle defendant to a new trial.—*State v. Carter*..... 272
7. *Pleading—Surplusage.* In an information charging a crime, useless allegations cannot destroy the legal effect of necessary averments.—*State v. Ackles*..... 462
8. *Assault with Intent to Murder—Charging Malice—Equivalent Words.* An information charging that the accused "did unlawfully, purposely and of his premeditated malice, and with intent to murder, assault and shoot one Benjamin Franklin with a deadly weapon," etc., sufficiently charges an assault with intent to commit murder in the second degree, as, under Code Proc., § 1243, allowing other words conveying the same meaning as the statutory words to be used, the place of the statutory word, "maliciously," is supplied by the words, "of his premeditated malice."—*Id*..... 462
9. *Same—Premeditation—Instructions.* Upon the trial under such an information, it is not error for the court to refuse to charge the jury that before they could find defendant guilty, they must find that the shooting was done purposely and of his premeditated malice, as premeditation is not an element of the crime charged.—*Id*..... 462

CRIMINAL LAW—CONTINUED.

10. *Same—Verdict.* Under an information charging the accused with an assault with an intent to commit murder, a verdict finding him "guilty of assault with a deadly weapon with intent to do bodily harm," is erroneous, as such verdict convicts him of an offense other than the one alleged in the information.—*Id.*..... 462
11. *Same—Evidence—Prior Quarrels.* In a prosecution for assault with intent to commit murder, evidence of quarrels and disputes between the defendant and the person assaulted, prior to the assault, is competent as tending to show ill will and motive.—*Id.*..... 462
12. *Information—Failure to Indorse State's Witnesses.* Where it does not appear that the defendant in a criminal prosecution was prejudiced by the fact that the names of the witnesses offered in rebuttal by the state were not indorsed upon the information, and no continuance was asked for on that ground, the error will be held harmless.—*State v. Regan*..... 506
13. *Evidence—Failure of State to Call Witness.* Proof of the reason why the state does not, in a second trial of a criminal case, call a witness who testified for the prosecution upon a former trial, is immaterial.—*State v. Coella*..... 512
14. *View of Premises.* Where there is no material controversy with regard to the premises where a homicide has been committed, it is not error to refuse to allow the jury to view the scene.—*Id.*..... 512
15. *Evidence.* In a prosecution for murder, where the theory of the state is that the motive for the crime was robbery, it is not error to sustain an objection to the question as to what was the largest sum deceased ever had in the bank at any time, although the object of such testimony is to show the habit of deceased to keep his money in bank and not in his room.—*Id.*..... 512
16. *Instructions—Indebtedness of Deceased to Accused.* In such cases it is not error for the court to refuse to charge the jury that at the time of the killing of deceased he was indebted to defendant in a large sum of money, where there is no controversy over the indebtedness.—*Id.*..... 512
17. *Misconduct of Prosecuting Attorney—Correction by Instructions.* Although incompetent questions are asked by the prosecuting attorney upon the trial of a criminal case for the purpose of prejudicing the jury against the accused, the refusal of the court to rebuke the attorney therefor is

CRIMINAL LAW—CONTINUED.

not error, when the court, at the time of objection taken thereto, states to the jury that "they are to give no weight to that testimony which is ruled out."—*State v. Manville*.... 523

See ADULTERY; CERTIORARI, 1, 2; COSTS, 2; HOMICIDE; INDICTMENT AND INFORMATION; JURY, 1, 3, 5; SEDUCTION.

DAMAGES.

1. *Breach of Contract—Evidence.* Where, in an action against a railroad company for damages for failure to dig a ditch, a written contract is set out in the complaint containing a conveyance of a right-of-way to the railroad on the condition subsequent that it excavate a certain ditch, evidence tending to show other terms of the contract which had not been included in the writing is inadmissible.—*Moorman v. Seattle & Montana Ry. Co.*..... 98
2. *Same—Measure of Damages.* A railroad company agreed to build a certain ditch in consideration of the conveyance to it of lands for right-of-way purposes. At a meeting of the land owners affected it was agreed that M. should convey a strip of land for right-of-way, which was appraised as worth \$1,000, and that adjoining land owners whose premises would be benefited by the ditch should give their notes to M. for \$1,000, conditioned upon the construction of the ditch by the railroad company. The appraisers were selected by the land owners from their disinterested neighbors. The company's right-of-way agent who negotiated for the conveyances was present at the meeting, and received from the land owners their assent to his proposal to dig the ditch for the right-of-way, but it was not shown that the agent participated in any of the arrangements made between the ditch beneficiaries, nor that he was consulted in regard to the appraisal or the award of notes. The conveyance was made, but the company failed to dig the ditch, and M. brought suit for damages in the sum of \$1,000, as fixed by said appraisal and notes. *Held*, That the company's liability could not be measured by the appraisal had by the land owners among themselves, and that the report of the appraisers was not admissible in evidence.—*Id.*..... 98
3. *Measure of Damages—Destruction of Crop.* In an action for special damages for the loss of a hop crop by reason of the diversion of the waters of a stream so as to deprive the irrigating ditches of a riparian proprietor of water, the

DAMAGES—CONTINUED.

measure of damages is the market value of the crop alleged to be lost over the cost of producing, harvesting and marketing.—*Shotwell v. Dodge*..... 337

See DEATH BY WRONGFUL ACT, 1, 2; WATERS AND WATERCOURSES, 1-4.

DEATH BY WRONGFUL ACT.

1. *Exemplary Damages*. Punitive or exemplary damages cannot be recovered in an action brought under § 139, Code Proc., authorizing an action for the injury or death of a child.—*Atrops v. Costello*..... 149
2. *Action for Damages—Proof of Pecuniary Loss*. In an action for damages for negligently causing the death of a child, pleading and proof of special pecuniary damages is unnecessary, as, in such cases, it falls within the province of the jury to judge of the pecuniary loss to the parents from the evidence showing the age of the child, its health, habits, character, and the station in life of the parents.—*Id.* 149
3. *Same—Evidence*. Where, in such an action, the plaintiff has testified to the age of his girl, who was a healthy and sound child; that she was industrious and capable and willing to work; was handy about doing housework; that the parents were engaged in keeping a boarding house, and that she was of great assistance to them in such employment; that the girl was going to school and he had intended to send her through the public schools; it is error to exclude testimony on the part of the defendant tending to show the expense attached to schooling, clothing and maintaining a child of her years, and the value of the earnings of a child of the same character in the same situation.—*Id.* 149

DEDICATION.

1. *Of Streets—Effect of Designation on Plat*. Where a recorded plat of lands contains a description of them by metes and bounds, the fact that the plat designates a street thereon as lying upon one side, but beyond the limits of the land described, creates a dedication of such street by implication merely, which presumption may be rebutted by evidence tending to show an intention otherwise. *Tilzie v. Hays*.... 187
2. *Same—Pleading and Proof*. In an action for breach of covenant of possession, wherein the complaint alleges a statutory dedication of the land in dispute by recorded plat, proof of subsequent conveyances recognizing the plat filed is irrelevant for the purpose of establishing dedication by estoppel.—*Id.*..... 187

DEED.

1. *Description—Construction.* Where the description in a conveyance of land can be made certain by reversing the courses from a point referred to in the third call as the southwest corner of the tract to be conveyed and the southeast corner of an adjoining tract, and a consideration of the description as a whole indicates that such common corner is intended as a controlling point, the deed should be so construed.—*Edson v. Knox*..... 642
2. *Insufficient Deed Construed as Contract.* Although a deed to lands is not sealed and acknowledged as required by statute, such instrument is sufficient to pass the equitable title of the grantor and those holding under him, and can be maintained as a contract for a deed.—*Id.*..... 642
3. *Conveyance of Lands in Parcels—Liability for Existing Liens.* Where the owner of a lot subject to a street assessment has conveyed away one-third of the lot by warranty deed, and subsequently conveys the balance of the lot by deed of general warranty except as to street assessments and taxes, the subsequent grantee takes with notice of the equities existing in favor of the first grantee, and he cannot pay the assessment and enforce the collection of one-third of the sum from the grantee holding under the first conveyance.—*Michaels v. Keane*..... 648

See EASEMENTS; EVIDENCE, 1.

DEPOSITION.

- Conditions Necessary to Justify Use—Presumptions.* The reasons which authorized depositions and which existed at the time they were taken will be presumed as still in existence at the time of the trial, if nothing appears to the contrary.—*Hennessy v. Niagara Fire Ins. Co.*..... 91

DESCENT AND DISTRIBUTION.

- Final Settlement.* The approval of an administrator's final account does not determine the administration upon an estate, but the court retains jurisdiction of the estate until there has been a final settlement, and a distribution of the property, or some other act equivalent thereto.—*Hazellon v. Bogardus*..... 102

See QUIETING TITLE, 2.

DIVORCE. See JUDGMENT, 1.

EASEMENTS.

Easement to Dig Gravel—Scope. Although the reservation made in a deed of the right to take gravel from the grantee's land for the purpose of repairing a mill dam is general in terms and fixes no place from which gravel should be taken, yet the fact that for more than ten years gravel had been taken from a certain pit on the land, which was the nearest and most convenient place from which the plaintiff could take gravel, and no other specific place had been pointed out by the grantee which was equally convenient, is sufficient to render such place an established pit, and give the plaintiff a right to take gravel therefrom without interference.—*Corliss v. Dunning*..... 332

See PARTY WALLS.

ELECTIONS AND VOTERS.

Registration—Municipal Election. Registration is not a necessary qualification of voters at a special election held under the provisions of the act of March 3, 1893, for the purpose of validating warrants and other evidences of indebtedness of cities and towns in certain cases.—*Graves v. Seattle*..... 248

EMINENT DOMAIN. See HUSBAND AND WIFE, 2.

EQUITY.

1. *Removal of County Seat—Fraudulent Election—Jurisdiction of Court.* The superior court has no jurisdiction of the subject matter of an action which seeks to enjoin the removal of a county seat on the ground of fraud committed in the election therefor.—*Parmeter v. Bourne*..... 45
2. *Same—Right of Action—Interest of Private Citizen.* A private citizen, although a taxpayer, has no such property interest in the location of a county seat as will give him a right of action to contest its removal.—*Id*..... 45

See DEED, 2, 3; INJUNCTION; JUDGMENT, 8; QUIETING TITLE; SPECIFIC PERFORMANCE, 6, 7; TRIAL, 6, 7.

ESTOPPEL.

Failure to Move Against Emergency Restraining Order. The fact that defendants have respected such an emergency restraining order for a considerable length of time, and have made no motion against it until appeal from the judgment in the action in which it was granted, does not estop

ESTOPPEL—CONTINUED.

them from denying that they have treated it as a temporary injunction.—*Coleman v. Columbia, etc., R. R. Co.*..... 227

See DEDICATION, 2; SPECIFIC PERFORMANCE, 4, 5.

EVIDENCE.

1. *Unacknowledged Deed—Record.* Where the validity of a deed as against third parties is contested on the ground that it was an unacknowledged instrument, as disclosed by the record in the auditor's office, the original deed itself, when purporting to be regularly acknowledged before a proper officer, is admissible in evidence without further proof of its execution.—*Gardner v. Port Blakely Mill Co.*..... 1
2. *Wrongful Taking of Lands—Action for Damages—Evidence of Value.* In an action against a city for damages for the wrongful appropriation of land, evidence of the price the owner had been offered for the land is inadmissible for the purpose of proving its value.—*Parke v. Seattle*..... 78
3. *Evidence at Former Trial—Stenographer's Notes.* A witness who has testified at a former trial on the same subject matter may be impeached by allowing the stenographer, who had taken notes at the time of the former trial, to read his notes, after showing that they were correct and that aside from them he had no recollection of what the witness had said.—*Klepsch v. Donald*..... 162
4. *Proof of Contents of Record from Original Instrument and Endorsements Thereon.* The original lien notice which has been filed for record and contains the endorsement of that fact together with the volume and page of the record certified under the seal of the county auditor, is admissible in evidence for the purpose of proving that a proper claim of lien had been verified and had been filed for record in the proper office.—*Garneau v. Port Blakely Mill Co.*..... 467
5. *Conversations.* Where a portion of a conversation has been drawn out in the examination of a witness, the opposing party is entitled to have the whole of it placed before the jury.—*State v. Regan*..... 506
6. *General Reputation.* General reputation cannot be proved by the testimony of a witness whose information is based on the story of one person.—*Id.*..... 506
7. *Conclusions of Witness.* The refusal of the court to permit an answer to a question, which merely asks for a conclusion of the witness, is not erroneous.—*State v. Coella*..... 512

EVIDENCE—CONTINUED.

8. *Agency—Declarations of Agent.* Agency can never be established by the declarations of an alleged agent; and the erroneous admission of such declarations in evidence in an action against the alleged principal are not cured by a charge to the jury that agency cannot be proved by the declarations of the agent, unless it appears reasonably certain from all the facts and circumstances in the case that no injury has resulted to the defendant by reason of the admission of such testimony.—*Comegys v. American Lumber Co.* 661
9. *Same.* In an action for the price of logs plaintiff should be non-suited, when the evidence of a sale to defendant is that the logs were purchased by an alleged agent, and the only proof of the alleged agency were the declarations of the agent himself, which there was no testimony adduced to show had ever been brought to the knowledge of defendant and ratified in any way.—*Id.* 661

See BONDS, 6, 7; CONTRACTS, 9; CRIMINAL LAW, 11, 13, 15; DAMAGES, 1, 2; DEATH BY WRONGFUL ACT, 3; DEDICATION, 1, 2; HOMICIDE, 2, 4, 6-8, 11; INSURANCE, 2, 3; JUDGMENT, 4; LANDLORD AND TENANT, 3, 4, 8; LOGS AND LOGGING, 2, 3; MASTER AND SERVANT, 1; NUISANCE, 1; PARTY WALLS, 1, 2; SHERIFFS AND CONSTABLES, 1, 2; TRESPASS; TRIAL, 3.

EXECUTION. See FRAUDULENT CONVEYANCES, 2.

EXECUTORS AND ADMINISTRATORS.

1. *Administration—Jurisdiction of Court.* Where the court acquires jurisdiction of a decedent's estate through a petition for the appointment of an administrator, which it denies, the court has power to proceed regularly to final distribution, although the widow of the decedent may protest against any administration.—*In re Wilbur's Estate.*..... 35
2. *Irregular Sale by Administrator—Curative Act.* Where an administrator's petition for the sale of land and the order of sale made thereon give such an indefinite description of the land that it cannot be located, the sale made thereunder cannot be validated by the statute curing sales of real estate by administrators (Gen. Stat., § 8066).—*Hazellon v. Bogardus.* 102
3. *Decedent's Estate—Sale to Pay Mortgage Debt.* The provision of § 1085, Code Proc., allowing the sale of a decedent's mortgaged property for the purpose of satisfying the mort-

EXECUTORS AND ADMINISTRATORS—CONTINUED.

gage debt, if the decedent "shall not have devised the same," merely limits the sale in case of a specific devise, and has no application to cases where the property has been devised to a residuary legatee.—*In re Clement's Estate* 323

4. *Same*—*Attorney Fees*. In ordering a sale of a decedent's mortgaged real estate to pay the mortgage thereon, under Code Proc., §1035, it is error for the court to award an attorney's fee as upon foreclosure to the holder of the mortgage.—*Id* 333

See APPEAL, 31; GUARDIAN AND WARD, 1, 2; PRACTICE IN CIVIL CASES, 4.

EXEMPTIONS. See ATTACHMENT, 1; HOMESTEAD, 1, 2.

FORCIBLE ENTRY AND DETAINER.

1. *Pleading—Complaint*. A complaint in an action of unlawful detainer, which alleges that certain of the defendants were in possession of the premises in controversy as tenants of plaintiff, that certain other defendants claim some right of possession under said tenants, that the notice to defendants to pay rent or surrender the premises was duly and legally served in accordance with the laws of the state relating thereto, merely states conclusions of law, and is not sufficient under Laws 1891, p. 179, requiring the plaintiff in such action to "set forth the facts on which he seeks to recover."—*Lowman v. West* 355
2. *Notice to Surrender—Pleading and Proof*. In the summary proceeding authorized by the action of unlawful detainer, the fact that defendants by their answer in effect dispute their landlord's title will not forfeit their right to notice to surrender the premises nor excuse the plaintiff's pleading and proving its service.—*Id* 355
3. *Counterclaim*. In an action instituted by a landlord against a tenant for rent, under the forcible entry and detainer act (Laws, 1891, p. 179), an answer setting up a counterclaim on account of repairs made by the tenant which it was the duty of the landlord to make, is demurrable on the ground that it does not state a defense.—*Phillips v. Port Townsend Lodge, No. 6* 529
4. *Equitable Defenses*. *Semble*: In such an action defendant cannot interpose an answer alleging that in drawing up the lease certain terms thereof were omitted by mutual mistake, and asking that the lease be reformed to express the contract of the parties.—*Id* 539

FRAUDS, STATUTE OF.

1. *Parol Contract for Sale of Building—Performance of Contract.* Where the owner of a building upon the land of another makes a parol contract of sale thereof to the land owner, and remains in possession thereof as a tenant, there is a sufficient performance of the contract of sale to take the case out of the statute of frauds.—*Reinhart v. Gregg*..... 191
2. *Promise to Pay Debt of Another.* Where a contractor upon a building has absconded, leaving unpaid labor bills, the promise of the owner of the building to a third party that, if he would pay the money due so the work could progress at once, the money should be refunded, is not a promise to answer for the debt of another, and does not therefore fall within the statute of frauds.—*Dibble v. DeMatteis*..... 542

FRAUDULENT CONVEYANCES.

1. *Instructions—Harmless Error.* Where the actual question at issue in an action of replevin is, whether or not the plaintiff had been a *bona fide* purchaser of the property, and the jury make a special finding that the plaintiff did not know that the sale to him was made with intent to hinder, delay or defraud creditors, a charge to the jury that "when a person purchases personal property with the knowledge that his vendor intends by the sale to defraud or defeat his creditors, or hinder or delay them in the collection of their debts, such purchaser will not be affected if he takes the property in good faith in payment of an honest debt," is not prejudicial, even if erroneous for the reason that it may imply that any debt less than the value of the property would suffice.—*Eicholtz v. Holmes*..... 71
2. *Setting Aside Fraudulent Conveyance—Proceedings Supplemental.* The provisions of Code Proc., tit. 8, ch. 6, governing proceedings supplementary to execution, do not afford an adequate remedy for the purpose of cancelling and setting aside a fraudulent conveyance of real estate, and resort may consequently be had to a court of equity for relief.—*Klosterman v. Mason County, etc., R. R. Co*..... 281
3. *Same—Pleading.* In an action to set aside a fraudulent conveyance, an allegation in the complaint that plaintiff had obtained a specific lien upon the property sought to be subjected to his judgment is unnecessary.—*Id*..... 281

See ATTACHMENT, 2; CORPORATIONS, 1.

GARNISHMENT.

Liability of County. A county cannot be garnished when it is not liable to an action on the part of the principal de-

GARNISHMENT—CONTINUED.

fendant, for the reason that his claim against the county has not been presented to the county commissioners and rejected in whole or in part by them.—*Eureka Sandstone Co. v. Pierce Co.*..... 236

See COSTS, 4.

GOOD WILL.

Construction of Contract. Where a person agrees, for a consideration, not to engage, within a certain time and within certain defined limits, in the grocery business, either in his own name or in that of another, or conduct or engage in such business for any other firm, person or corporation, with any share of the profits, or with any interest in the property, and with no secret or actual accounting or division of either property or profits for his benefit, or for compensation regulated on the basis of profits, or sales of property or stock, it is not a violation of the contract for him to enter the employ of another grocery firm within said defined limits as a salesman upon a monthly salary.—*Haley Grocery Co. v. Haley*..... 75

GUARDIAN AND WARD.

1. *Settlement and Accounting—Right of Heir to Insurance Money.* Where an insurance policy is made payable to the children of deceased, the money collected thereon is no part of decedent's estate, but goes directly to the heirs.—*In re Guardianship of Hill's Heirs*..... 830
2. *Same—Commingleing of Funds of Minor's and Decedent's Estates.* Where a guardian, who is also one of the executors of the estate of his wards' deceased father, allows the funds belonging to his wards to become commingled with the funds of the testator's estate, and his accounts as guardian to become confused with the accounts of the executors, the court is warranted in finding that the minor heirs had been supported from the funds of the estate, and that insurance money collected by the guardian had been kept intact for the use of the wards.—*Id.*..... 830

HOMESTEAD.

1. *Selection of Homestead.* The provision of Laws 1877, p. 72, §346, requiring the person claiming a homestead in certain real estate to cause the word "homestead" to be entered of record on the margin of his recorded title to such land, was repealed by the Code of 1881.—*Philbrick v. Andrews*..... 7

HOMESTEAD—CONTINUED.

2. *Same*. Where a judgment debtor with his family is occupying certain lands as a homestead, such occupancy amounts to the selection of a homestead, under the provisions of Code Proc., § 481.—*Id*..... 7

See JUDGMENT, 1.

HOMICIDE.

1. *Information—Manslaughter*. An information which states, in substance, that the defendants unlawfully, willfully and feloniously inflicted a mortal wound, or wounds, upon the deceased, and does not aver that the killing of the deceased was willfully or voluntarily done, charges the crime of involuntary manslaughter.—*State v. Gile*..... 12
2. *Same—Evidence*. Although an information charging manslaughter may not show that the accused bore the relation to the deceased of surgeon, and that death resulted from a surgical operation performed, evidence touching the character of the operation, the propriety of performing it, and the subsequent treatment of the deceased, is admissible.—*Id* 12
3. *Manslaughter—Result of Surgical Operation—Defense*. In an action for manslaughter against a surgeon for causing death by a surgical operation, the consent of the deceased to the operation is a good defense only where the operation is performed with due care and skill.—*Id*..... 12
4. *Evidence—Dying Declarations*. Where it is shown by competent testimony that after deceased had lost all hope or expectation of recovery, and while under a solemn sense of impending death, he stated that he had been "butchered" by the doctors, the evidence is admissible as a dying declaration as to the cause of the declarant's death.—*Id* 12
5. *Instructions—Reasonable Doubt*. Where the court charges the jury that, "A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence. If, after considering all the evidence in the case, you can say that you have an abiding conviction of the truth of the charge, then you are satisfied beyond a reasonable doubt, and should convict; if you have not such a conviction, you should acquit," it is not error to refuse a request for a charge that "a reasonable doubt for a trial juror is such a doubt as a man of ordinary prudence, sensibility and decision, in determining an issue of like concern to himself as that before the jury

HOMICIDE—CONTINUED.

- to the defendant 'would allow to have any influence whatever upon him, or make him pause or hesitate in arriving at his determination.'—*Id.*..... 12
6. *Evidence—Good Character of Deceased.* In a prosecution for homicide it is not competent to show the peaceable disposition or character of the deceased, or his good reputation, unless it has been assailed by the defense, although proof of the good character of the defendant may have been put in evidence.—*State v. Eddon*..... 292
7. *Dying Declarations.* The dying declaration of deceased calling witnesses to note the fact that he was unarmed is inadmissible as a part of the *res geste*.—*Id.*..... 292
8. *Same—Weight of.* An instruction that when dying declarations are before the jury they are to be treated as the other evidence in the case, is erroneous, as the same weight should not be attached to such testimony as to that of witnesses who can be subjected to cross-examination.—*Id.*..... 292
9. *Sufficiency of Information.* An information charged that the defendant "did feloniously, purposely and maliciously make an assault on one Edward Guthrie, and with a certain knife which he, the said defendant, then and there had and held in his hand, did then and there feloniously, purposely and maliciously strike, stab, thrust and cut at, upon and into the said Edward Guthrie, inflicting upon the said Edward Guthrie one mortal wound, of which mortal wound the said Edward Guthrie then and there died." *Held*, That the information was not bad for duplicity; that it charged acts constituting a crime; that it alleged the killing was done by means of a knife in the hands of defendant, and that a knife is *prima facie* presumed to be a deadly weapon.—*State v. Regan*..... 506
10. *Corpus Delicti—Sufficiency of Proof.* It is not error for the court to refuse to instruct the jury to find a verdict of not guilty in a prosecution for murder, when the state has proved the killing by defendant of deceased, the weapons used, and the condition in which the body was found; and has shown a motive for the killing.—*State v. Coella*..... 512
11. *Evidence—Confessions Resulting from Fear—When Admissible.* In a prosecution for murder, where the plea of self defense is set up, the admission in evidence of the statement of defendant that he killed the deceased is harmless error, though the confession was made as the result of fear produced by threats, when no further particulars than

HOMICIDE—CONTINUED.

the mere killing are wrung from the defendant while under the influence of fear.—*Id* 512

HUSBAND AND WIFE.

1. *Separate Property.* Lands acquired by a married man under the act of congress providing for the sale of timber lands are his separate property, and can be alienated without the consent of his wife.—*Gardner v. Port Blakely Mill Co* 1
2. *Action for Damages to Community Land—Joinder.* In an action for damages for the wrongful taking of community real property the wife is a necessary party plaintiff with the husband.—*Parke v. Seattle* 78
3. *Action by Wife—Depriving Wife of Husband's Society and Support—Sufficiency of Evidence.* In an action for damages by a wife against her husband's father and mother for causing her husband to abandon her and for depriving her of support and maintenance, the plaintiff should be nonsuited when her evidence merely shows that she was driven away from the house of defendants, where she and her husband had been living with his parents, that he did not go with her, that her mother-in-law had said that her son would not live with plaintiff any longer, that plaintiff's husband failed to keep an appointment to meet her, and that the mother-in-law had requested another person to use influence to prevent her son from again living with plaintiff, for the reason that if he did so his father would disinherit him.—*Young v. Young* 81

See LANDLORD AND TENANT, 1; MARRIAGE; SPECIFIC PERFORMANCE, 4, 5.

INDIANS. See MARRIAGE, 1, 2.

INDICTMENT AND INFORMATION.

1. *Amendment.* It is a matter within the discretion of the court to allow the prosecuting attorney to withdraw an information on file prior to the commencement of the trial, and file another charging the same offense.—*State v. Gile* ... 12
2. *Variance from Commitment.* The fact that an information does not charge the same crime as that upon which the accused was committed upon the hearing before a justice of the peace is no ground for setting aside the information.—*State v. Myers* 177

See CRIMINAL LAW, 7, 8, 12; HOMICIDE, 1, 9.

INJUNCTION.

1. *Counterclaim for Damages.* In an action to enjoin defendant from interfering with plaintiff's right to take gravel from defendant's land, defendant cannot counterclaim for damages committed by plaintiff to defendant's land and growing wheat, when such trespass has no connection with his taking of gravel.—*Corliss v. Dunning*..... 332
2. *Removal of County Seat—Action by County Officer to Enjoin.* Injunction will lie at the suit of a county officer to enjoin the removal of the county seat, when the board of county commissioners had never obtained jurisdiction by proper petition to order the submission of the question to popular vote.—*Rickey v. Williams*..... 479
3. *Against Trespass on Tide Lands—Action by Upland Owner.* An upland owner has, under the laws of this state, a preference right of purchasing the tide lands lying in front of his lands where such lands have not been occupied and improved by others prior to March 26, 1890, and, by reason thereof, is entitled to an injunction against mere trespassers who are attempting to occupy or interfere in any way with his possession of such tide lands. (*Pierce v. Kennedy*, 2 Wash. 324, and *Morse v. O'Connell*, 7 Wash. 117, distinguished.)—*West Coast Improvement Co. v. Winsor*..... 490

See APPEAL, 7, 21; ESTOPPEL.

INSURANCE.

1. *Ascertainment of Loss Through Appraisers—Waiver of Conditions.* The denial of liability by an insurance company for a loss is a waiver of a condition of the policy requiring arbitration in case of a disagreement between the company and the assured as to the amount of the loss.—*Hennessy v. Niagara Fire Ins. Co.*..... 91
2. *Action on Policy—Evidence.* Where the defense to an action upon a policy of fire insurance is that the assured swore falsely in his proofs of loss, the proofs are admissible in evidence.—*Id.*..... 91
3. *Same.* Proof by an insurance company of what it would cost to repair a building damaged by fire is not admissible for the purpose of showing the extent of the fire.—*Id.*..... 91
4. *Action on Policy—Conflict of Laws—Pleading.* In an action upon a policy issued by an insurance company incorporated in this state upon property in the State of New York, an answer alleging that the company was not authorized to do business in the State of New York; that by

INSURANCE—CONTINUED.

the laws of said state policies issued without compliance therewith are declared to be null and void unless procured by a licensed agent therefor; that the policy in suit was procured by a broker of New York city, and that such pretended policy of insurance sued on was issued, delivered and received in violation of the said laws of the State of New York, and was not procured in the manner in said laws provided or authorized, states facts sufficient to constitute a defense.—*Wood v. Cascade Fire, etc., Ins. Co.* 427

5. *Action on Policy—Recovery of Interest.* Interest is recoverable on the amount due under an insurance policy from the time such sum becomes payable.—*Id.* 427

See PRINCIPAL AND AGENT.

INTEREST.

1. *Right to Interest.* In such an action, it is not error to charge the jury that if they find for plaintiff they may include interest, as, the claim of the plaintiff being for a definite, liquidated sum, it would draw interest from the time of beginning the action.—*Edison, etc., Co. v. Navigation Co.* 870
2. *Interest on County Warrants—Effect of Law Changing Rate.* Under the laws of this state a county warrant is a contract to pay money, and, if not paid on presentment to the county treasurer, the legal rate of interest in effect at such time enters into the contract as a part thereof, and cannot be affected by a subsequent law reducing the rate.—*Union Savings Bank v. Gelbach*..... 497

See INSURANCE, 5.

JUDGMENT.

1. *Decree for Alimony—When Subject to Right of Homestead.* Where, in an action for divorce, the property of the husband has not been brought into the case, a decree in favor of the wife for alimony creates no specific lien on the property; and the husband's right to a homestead exemption is paramount to the lien created by an execution levy under such judgment.—*Philbrick v. Andrews* 7
2. *Res Judicata—Pleading and Proof.* Where the state of the pleadings is such that the plea of *res judicata* cannot be interposed, and there is no opportunity to raise the point on the introduction of evidence, the court may, where both causes are matters of record in the court, take judicial notice thereof.—*Wilkes v. Davies*..... 112

JUDGMENT—CONTINUED.

3. *Judgment in Attachment Based on Unverified Affidavit—Open to Collateral Attack.* Where, as the foundation for attachment proceedings, a paper was filed in the form of an affidavit, signed by the attorney of plaintiff, but there was nothing upon its face nor in the record to show that it was ever sworn to, the court could not obtain jurisdiction of the subject matter, and judgment of sale rendered in such proceedings would be an absolute nullity, which could be attacked without a direct proceeding for that purpose.—*Tacoma Grocery Co. v. Draham*..... 263
4. *Lien—To What Interest Attaches—Evidence.* In an action to foreclose a mortgage on certain real estate, to which one of the defendants interposes the defense that he has a paramount interest by reason of a judgment lien against a leasehold interest in the land, evidence is admissible to show that the actual interest of the judgment debtor in the lands is less than it is made to appear by the county records.—*Book v. Willey*..... 267
5. *Res Judicata—Action Against Sureties on Bond—Prior Judgment Against Principal.* An action on the bond of a contractor, given under the provisions of Gen. Stat., §2415, for the protection of those furnishing the contractor goods while engaged in making street improvements, is not barred by the procuring of a judgment against the contractor personally prior to the institution of suit upon his bond.—*Fischer v. Quigley*..... 327
6. *Vacation of Judgment—Abuse of Discretion.* Where judgment of default has been entered against a plaintiff for failure to appear at the trial of the cause on the day set therefor, it is an abuse of discretion for the court to refuse to vacate the judgment, when the plaintiff comes into court within twenty minutes after the opening of court, which was called at the early hour of 8:30 A. M., and moves to vacate the judgment, and the defendant in open court consents thereto.—*Bank of Commerce v. Warren*..... 477
7. *Modifying Judgment—Fraud.* A judgment will not be vacated or modified on the ground of fraud when the only basis for such allegation is the fact that plaintiff sought for and obtained a decree of foreclosure covering all the land described in the mortgage, although a certain portion of the land had been released by the mortgagee.—*State, ex rel. Wolferman, v. Superior Court*..... 591
8. *Judgment Without Service—Setting Aside.* Where a mortgagor has not been served with summons in a suit to fore-

JUDGMENT—CONTINUED.

close his mortgage, an action on his part to set aside the decree of sale rendered in the foreclosure suit cannot be defeated on the ground of laches from the fact that he had neglected for five years to pay the mortgage debt and during the same period had not paid taxes on the land nor exercised any acts of ownership over it, though residing in a neighboring county and possessing the ability to pay.—*McEachern v. Brackett*..... 652

9. *Judgment Without Service of Summons—Unauthorized Appearance of Attorney.* Where a judgment has been rendered against a party not served with process, but in whose behalf an unauthorized attorney had appeared and pleaded, the judgment will be set aside as a nullity, although innocent third parties may suffer, when the application for relief is made promptly upon the discovery of the existence of the judgment, and when the proof that the attorney did not have authority to appear is clear and convincing.—*Id*..... 652

See APPEAL, 4, 8, 30; JUSTICES OF THE PEACE; LOGS AND LOGGING, 5-7; MECHANICS' LIENS, 6; NUISANCE, 2; QUO WARRANTO, 8; REPLEVIN, 8.

JURY.

1. *Competency of Juror.* It is not error to refuse a challenge for cause to a juror who states that he has read about the case in a newspaper, which created a kind of impression upon his mind which he expected would require a certain amount of evidence to remove, but that his mind would yield as readily to the evidence as if he had never heard anything whatever about the case.—*State v. Gile*..... 12
2. *Suit Against County—Interest of Taxpaying Juror.* The interest of jurors as taxpayers of a county in an action against the county will not disqualify them from serving as a jury to try the cause.—*Rathbun v. Thurston Co*..... 238
3. *Peremptory Challenges—Method of Exercising.* Construing all the statutory provisions together on the subject of challenges to jurors, the defendant must, in a prosecution for homicide, exercise two peremptory challenges to one by the state, until the twelve and six peremptory challenges allowed them respectively are exhausted.—*State v. Eddon*..... 292
4. *Competency of Juror.* It is ground of challenge to a juror when he states that he knows one of the parties and would believe his statement of a fact when it was contradicted only by the statement of some witness whom he did not know.—*Stinson v. Sachs*..... 391

JURY—CONTINUED.

5. *Same*. A juror in a murder trial is not disqualified by the fact that he had heard what purported to be the facts relative to the killing from several persons soon after its occurrence, when he testifies that he could disregard any impression received therefrom, and try the case fairly upon the evidence.—*State v. Coella* 512

See APPEAL, 22; CRIMINAL LAW, 1.

JUSTICES OF THE PEACE.

- Docket—Dating and Signing Judgment*. The judgment rendered by a justice of the peace is not void for want of signing, when his docket shows that all the proceedings were entered consecutively under the title of the cause and that the justice signed the docket at the conclusion thereof.—*State v. White* 230

See CERTIORARI, 1-3; CRIMINAL LAW, 5.

LANDLORD AND TENANT.

1. *Lease by one Spouse of Community Land—Rescission by Lessee*. Before a lessee can elect to rescind a lease of community real estate, which has been executed by but one of the spouses, he must give the contracting party an opportunity to furnish a contract legally executed.—*Tryon v. Davis* 106
2. *Action for Rent—Defenses*. In an action upon such a lease to recover rent, an answer setting up that defendant "notified the plaintiff of the defect in said lease and that he would no longer hold or occupy said premises under the same, and that he was ready then and there to surrender to the plaintiff possession of said premises or to pay him a reasonable rental for the use and occupation of the same from month to month while occupying the same," is not sufficient to constitute a defense.—*Id* 106
3. *Same—Evidence*. Neither under such affirmative defense nor under the general issue is evidence admissible that defendant notified plaintiff's agent for the collection of rent that the lease was void and that defendant would no longer occupy the premises under it.—*Id* 106
4. *Same*. In an action to recover rent under the terms of a lease, proof of the lessor's ownership of the premises is unnecessary.—*Id* 106
5. *When Relation Established*. The relation of landlord and tenant is established where the owner of premises permits

LANDLORD AND TENANT—CONTINUED.

another to take possession thereof for any determinate period.—*McLennan v. Grant* 608

6. *Repudiation of Lease After Entry.* Where tenants have entered into possession of premises under a contract of lease, neither they nor their assigns can repudiate the lease because of uncertainty in the description of the premises.—*Id.* 608

7. *Conveyance of Lessee's Interest.* Any conveyance by a lessee of his whole interest in demised premises, leaving no reversionary interest in himself, operates as an assignment regardless of the form of the instrument of transfer; and a purchaser entering under such conveyance becomes a tenant of the lessor, although he may have had no notice that his grantor had merely a leasehold interest.—*Id.* 608

8. *Action for Detainer—Evidence.* In an action of unlawful detainer against the assignees of a tenant, it is prejudicial error to permit proof that plaintiffs made no claim to the premises while defendants were in possession prior to the expiration of the term.—*Id.* 608

See FORCIBLE ENTRY AND DETAINER, 1-4; MECHANIC'S LIENS, 5; PARTNERSHIP, 1.

LIMITATION OF ACTIONS.

When Statute is Applicable. In order to bar an action for the recovery of real estate under Code 1881, §26, adverse possession must have been maintained for a period of ten years subsequent to the taking effect of that statute.—*Tacomoma Bldg., etc., Association v. Clark* 289

See MUNICIPAL CORPORATIONS, 5.

LOGS AND LOGGING.

1. *Liens—Effect of Repeal of Statute.* A statutory right of lien given loggers for labor in getting out logs becomes such a part of the contract for such labor as to be unaffected by the repeal of the statute pending the enforcement of the lien.—*Garneau v. Port Blakely Mill Co.* 467

2. *Enforcement of Lien—Evidence—Place of Cutting.* In an action to enforce a logger's lien, proof must be made that the logs were cut in the county where the lien notice was filed.—*Id.* 467

3. *Same—Time Checks.* In an action to foreclose a logger's lien, time checks given by the employer are competent as evidence even against a third party impleaded as defendant on account of some interest in the logs.—*Id.* 467

LOGS AND LOGGING—CONTINUED.

4. *Same—Attorney Fees.* Where a number of lien claimants have united in one suit for the foreclosure of their respective liens, an attorney's fee of twenty dollars in each case is not excessive.—*Id.* 467
5. *Same—Decree.* Where a large number of lien claimants join in a proceeding for the foreclosure of loggers' liens, and the pleading, proofs and findings establish that each lienor assisted in producing certain logs of which the marks and quantity in feet were given, the decree should set out the logs upon which the several recoveries can be had.—*Id.* 467
6. *Eloignement—When Judgment Unwarranted.* A personal judgment against a third party for the removal of logs beyond the jurisdiction of the county, under Laws 1893, p. 428, authorizing the recovery of damages therefor in the proceeding to foreclose liens, is unwarranted when the act of eloignement was committed prior to the taking effect of said law.—*Id.* 467
7. *Same.* A judgment for damages for the eloignement of logs is unwarranted when there is no proof of the value of the logs.—*Id.* 467
8. *Loggers' Liens—Foreclosure—Destruction of Logs—Remedies.* In an action to foreclose loggers' liens, the person who has destroyed the identity of the logs to which a right of lien attached cannot be made a party defendant for the purpose of being made to respond in damages for the injury; but the remedy of the laborers is to bring separate actions against their employers for the respective sums due them for labor, and, under Gen. Stat., § 1694, they have another right of action against the person sawing up and destroying the identity of the logs for the actual damages suffered by them.—*Singer v. Wallace.* 576
9. *Right of Lien—Release.* Where laborers engaged in getting out saw logs have expressly released all right of lien upon the logs cut within thirty days of the time of filing liens, the right to lien upon logs cut prior thereto is thereby lost.—*Campbell v. Vincent.* 650

MARRIAGE.

1. *Marriage With Indian—Validity.* The marriage of a white man to a Swinomish Indian woman, although contracted on the reservation of that tribe and pursuant to its customs, was void if celebrated while the territorial law of 1866 forbidding marriages between Indians and white persons was in force, as, under the organic act of this territory and the

MARRIAGE—CONTINUED.

- treaty with said tribe, such reservation was left within and a part of the territory, for all legislative and judicial purposes not affecting the personal rights and the lands and other property of the Indians.—*In re Wilbur's Estate*..... 85
2. *Same*. The fact that the law forbidding a white person to marry an Indian was repealed within a short time after the celebration of such forbidden marriage, and that cohabitation was continued subsequent to such repeal, would not constitute a marriage.—*Id*..... 85

MANDAMUS.

- Remedy by Appeal*. Mandamus will not lie to compel the county commissioners to make an award for county printing, as there is an adequate remedy by appeal from their orders in such cases.—*State, ex rel. DeKackin, v. Allen*..... 168

MASTER AND SERVANT.

1. *Defective Appliances—Alterations Subsequent to Injury—Evidence*. In an action to recover for injuries received on account of the negligence of the master in providing imperfect machinery and appliances, evidence is incompetent for the purpose of showing that changes had been made in such machinery after the injury to plaintiff.—*Bell v. Washington Cedar Shingle Co* 27
2. *Same—Instructions*. In such a case, where testimony as to alterations has been admitted, it is error to refuse defendant's request for an instruction that the fact of such alterations "after the accident in question is not a matter from which you are at liberty to infer that it was out of repair, imperfect or unsafe at the time the accident occurred."—*Id*..... 27
3. *Action for Causing Death of Servant—Contributory Negligence*. In an action for damages for death caused by the wrongful act of defendant, there can be no recovery on the ground of the contributory negligence of the deceased, when the evidence shows that deceased was an employé of a cable railway company; that among his duties was the placing of cans of lubricating oil on the dummy cars prior to their first trip, and the oiling of the sheave wheels of the cable before it was started for the day; that on the day of the injury he arrived a little late to his work, and that before he had replaced the planks above the manhole leading to the sheave wheels, after oiling them, he was angrily ordered by the superintendent to let the planks alone and

MASTER AND SERVANT—CONTINUED.

get out the cars; that the first train was then being pushed out of the power house, and that he rushed into the house, caught up an oil can, and hastened to place it in position on the dummy car, which was at the time being pushed toward the sheave wheels, and that after arranging the can he stepped off the car into the uncovered manhole and was crushed to death by the sheave wheels.—*Brennan v. Front St. Cable Ry. Co.*..... 363

MECHANICS' LIENS.

1. *Enforcement—Limitations.* Where proceedings to enforce a mechanic's lien have been commenced within the time limited by § 1670, Gen. Stat., the fact that judgment is not rendered until after the expiration of such limitation will not defeat the lien.—*Pacific Mfg. Co. v. Brown.*..... 347
2. *Proceedings to Perfect—Novation.* Where a material man refuses to furnish materials for a building under his contract with the contractor, but makes a new contract with another party for furnishing materials for the completion of the building, his claim of lien for materials under the old contract must be filed within ninety days after ceasing to furnish materials thereunder.—*Id.*..... 347
3. *Foreclosure of Mortgage upon Premises—Effect upon Mechanic's Lien—Lis Pendens.* Where a lien claimant's right to lien accrues subsequent to the commencement of a mortgage foreclosure suit on the premises, and such lien claimant has actual knowledge of such suit, and does not seek, by intervening or otherwise, to protect his rights, he is bound by the judgment in such foreclosure suit.—*Id.*..... 347
4. *Same—Want of Notice to Lien Claimant—Burden of Proof.* In a proceeding to enforce a lien against premises which have been sold under decree in a suit for foreclosure of a mortgage, to which the lien claimant was not made a party nor had knowledge thereof through notice of *lis pendens*, the burden of proof is upon the party claiming under the foreclosure sale to establish by a clear preponderance of the evidence that the lien claimant had actual knowledge of the pendency of the foreclosure suit.—*Id.*..... 347
5. *Improvement by Lessee—Liability of Owner.* The liens of mechanics and material men for labor performed and material furnished in the alteration and repair of a building at the instance of a lessee thereof attach only to the leasehold interest, and do not bind the owner, in the absence of au-

MECHANICS' LIENS — CONTINUED.

- thority to the lessee to act as his agent.— *Z. C. Miles Co. v. Gordon* 442
6. *Foreclosure — Personal Judgment Against Contractor — Reversal of Foreclosure Decree.* An appeal from a decree of foreclosure of a mechanic's lien, which results in a reversal of the decree on account of the invalidity of the lien, will not affect the personal judgment obtained against the contractor in the foreclosure proceeding, when he has not joined in the appeal.— *Littell v. Miller* 566

MORTGAGES.

1. *Deed Absolute on its Face — Option to Grantor to Repurchase.* A deed absolute on its face will not be construed as a mortgage, although a separate writing in the nature of an option contract was executed at the same time by the grantee agreeing to reconvey upon certain conditions, when it appears that the grantee declined to make a loan upon the property, and that, upon the importunity of the grantors, he agreed to purchase their equity of redemption, which they were about to lose under an incumbrance already upon the property, and further, that the parties were dealing upon equal terms and the consideration was not grossly inadequate.— *Dignan v. Moore* 812
2. *Foreclosure — Defenses.* In an action to foreclose a mortgage, an answer alleging non-delivery by the mortgagor and want of consideration for the execution of the mortgage states good defenses.— *Ault v. Blackman* 624
3. *Estoppel to Dispute Validity of Prior Mortgage.* The bare recital in a mortgage that it is subject to a prior mortgage will not estop the mortgagee from questioning the consideration or validity of such prior mortgage, when the mortgagor is assailing it on the same grounds.— *Id.* 624
4. *Fraud in Procuring — Evidence.* A charge of fraud in the procurement of a mortgage is not established by proof that the mortgagors had but a limited knowledge of the English language, and that they did not intend to give any mortgage on the land, but were led to believe they were executing an assignment of certain notes of other parties to the mortgagee in full payment for the land, when it is shown that the mortgagee never had possession of such notes, and that the interest of the mortgagors therein amounted to but \$700, while the value of the land conveyed by the mortgagee was \$1,250.— *Hersner v. Martin* 698

MORTGAGES—CONTINUED.

5. *Exhaustion of Other Securities—Rights of Mortgagee.* A mortgagee to whom other security is given in addition to his mortgage is not compelled to exhaust such security before relying upon the mortgage executed to him.—*Id.* 696

See ATTORNEY AND CLIENT, 1; EXECUTORS AND ADMINISTRATORS, 3, 4; JUDGMENT, 4, 7, 8; MECHANICS' LIENS, 3, 4; RECEIVERS, 2.

MUNICIPAL CORPORATIONS.

1. *Liability for Injuries Received in Public Parks.* Where a city is given a license to occupy lands for park purposes for the use of the public, it is not liable for injuries occasioned by the negligence of its officers and employes while engaged in the improvement of the park for the benefit of the public.—*Russell v. Tacoma* 156
2. *Freeholder's Charter—Delegation of Power—Salaries of Officers.* Under the act of March 24, 1890, delegating to cities of twenty thousand or more inhabitants the power to frame a charter for their government, the salary of elective officers must be provided for in the charter itself, and cannot be re-delegated by the charter framers to the legislative bodies of such cities.—*Taylor v. Tacoma* 174
3. *Same.* Sec. 216 of the freeholders' charter of Tacoma (1890) providing that "all the officers of the city . . . shall receive in full compensation for all services of every kind whatsoever rendered by them the amount of salaries that may be fixed by ordinance, . . . but in no case shall said salaries exceed the following amounts: . . . City controller, \$4,000 per annum," is an attempted delegation by the charter framers of the power of fixing salaries, and an ordinance passed in pursuance thereof is *ultra vires*, under the provisions of § 6, Laws 1889-90, p. 223.—*Id.* 174
4. *Contracts—Bonds for Liquidated Damages.* It is not within the corporate powers of a city of the third class to take a bond conditioned that the obligors shall construct a street railway upon its streets, and in case of default shall pay a certain sum as liquidated damages.—*Aberdeen v. Honey* 251
5. *Claims Against Cities—Limitation on Right of Action.* The provision of art. 4, § 33 of the freeholders' charter of Seattle, declaring that no action shall be maintained against the city for any claim for damages, unless such claim has been presented to the city council and filed with the city clerk within six months after the time when such claim for dam-

MUNICIPAL CORPORATIONS—CONTINUED.

- ages accrued, is not unconstitutional and void as being in contravention of the statute of limitations with reference to the commencement of actions.—*Scurry v. Seattle*..... 278
6. *Assessment for Street Improvement—Change of Method.* Although a street improvement has been initiated by a city under a law providing for assessment therefor according to valuation of property in the assessment district, and, during the progress of the improvement, the law has been changed so as to provide for assessment per front foot of the abutting property, yet the assessment under the scheme subsequently adopted will be valid and binding, provided the property owners are not thereby called upon to pay any greater amount of money nor to make any earlier payment than was required under the law in force at the time of beginning the improvement.—*Spokane v. Browne*..... 317
7. *Same—Rights of City and Abutting Owner.* Where the contract for a street improvement was let and the work partly done before the adoption of a new city charter, which changed the method of assessment, such repeal would not affect the right of the city to enforce its equitable right to reimbursement by the property owner for the obligations incurred by the city under its contract for such improvement. (*Wilson v. Seattle*, 2 Wash. 543, distinguished.)—*Id.* 317
8. *Assessment Roll—Description of Improvements.* Proceedings for a street improvement are not void because the ordinance provides for grading the street from the Seattle, Lake Shore & Eastern Railway to the south line of Buckeye street, and the assessment roll describes the work as done from the Union Pacific Railway to the Fair Grounds, when it is shown that such boundary lines are in fact identical.—*Id.* 317
9. *Public Improvements—Grading.* Where an ordinance provides that a certain street be "graded," it is sufficient to authorize improvements consisting of "grading, grubbing, guttering and curbing" the street.—*Id.* 317
10. *Passage of Ordinances.* Sec. 635, Gen. Stat., governing the passage of laws by the council in cities of the third class, applies to all ordinances of every kind and for every purpose.—*Vancouver v. Wintler*..... 378
11. *Same.* The passage of an ordinance on the day it was reported to the city council by the city attorney, to whom it had been referred, does not invalidate the ordinance, under the provisions of §635, Gen. Stat., when such ordinance is merely a substitute for one introduced more than

MUNICIPAL CORPORATIONS—CONTINUED.

- five days prior to its passage, and the substitute falls clearly within the limits of the subject matter of the original proposition.—*Id.* 378
12. *Land Taken by City Without Authority—Remedy.* In an action by a city to foreclose a lien for a street assessment, the defendant cannot set up a counterclaim for the value of a strip of land which it was alleged had been taken possession of by the city and improved for street purposes.—*Id.* 378
13. *Extension of City Limits—Power to Improve County Road.* When the boundaries of a city have been extended it has power to improve a highway falling within its limits which had been opened as a county road.—*Id.* 378
14. *Street Improvements—Assessment of Benefits.* Under the statute conferring power upon cities of the third class to make street improvements and assess abutting property, and an ordinance of the city of Vancouver passed pursuant thereto providing that when the city council shall have contracted for the improvement of any street "the cost and expense of such improvement shall be assessed upon the lots and land fronting thereon," property which has been rendered liable for an improvement ordered on a portion of a street cannot be subjected to an additional liability for a continuation of the improvement on another part of the street, made under another contract, although the property thus sought to be subjected has received benefits under the second contract.—*Id.* 378
15. *Same—Illegal Assessment—Effect.* Where an assessment against property for street improvement is illegal for the reason that it seeks to charge the property with the cost of improvements for which it is not liable, there can be no recovery, in an action to foreclose such assessment, of the amount that is properly chargeable against the property.—*Id.* 378
16. *Foreclosure of Street Assessment—Evidence—Presumption of Regularity of Proceedings.* In an action by the city of Seattle to foreclose a street assessment, under §§ 10 and 95, Laws 1885-86, pp. 243, 268, the assessment roll is *prima facie* proof of the regularity of all proceedings prior to the levy of the assessment, and the want of notice to property holders that the improvement was to be made is matter of defense.—*Seattle v. Smith.* 387
17. *Validation of Void Incorporations.* The act of March 9, 1898 (Laws, p. 183), providing for the legalization of those

MUNICIPAL CORPORATIONS—CONTINUED.

cities and towns which had attempted to incorporate or re-incorporate under the act of March 27, 1890, where such bodies had, at the date of the passage of the act, an organized government, which had been maintained since the date of such attempted incorporation, is constitutional and sufficient to validate a *de facto* town which had attempted to incorporate under the void act of February 2, 1888, and again to re-incorporate under the unconstitutional provisions of § 4 of the act of March 27, 1890.—*Pullman v. Hungate*. 519

18. *Action Against Municipal Corporation—Denial of Corporate Existence.* The validity of the incorporation of a city cannot be questioned in an action brought against it as a municipal corporation; nor can its corporate existence be attacked in a collateral action.—*Ferguson v. Snohomish* . 668

19. *Extension of City Limits.* The constitution and statutes thereunder, providing for the incorporation of cities and towns, do not confine the corporation to the exact limits of any preëxisting city or town, but the question of boundary may be determined by the vote of the people within the limits of the proposed incorporation upon the submission of a proposition therefor by the county commissioners based upon the petition of residents within the proposed boundaries.—*Id.*..... 668

See ELECTIONS AND VOTERS; OFFICE AND OFFICER, 4;
QUO WARRANTO, 1, 2; TAXATION, 1-4, 7.

NEGLIGENCE.

Blasting. Where a heavy fragment of rock is, by the discharge of a blast, thrown a distance of 940 feet, through the roof of a house, killing a man within, such fact is *prima facie* proof of negligence in the management of the blast; and such presumption of negligence is not rebutted by proof that the employes managing the blasting were competent and careful men, and had received strict instructions to be careful.—*Klepsch v. Donald*..... 162

See MASTER AND SERVANT, 1-3; MUNICIPAL CORPORATIONS, 1; PRACTICE IN CIVIL CASES, 2.

NEGOTIABLE INSTRUMENTS.

1. *Action on Promissory Note Payable to Agent.* Where an agent takes a promissory note payable to himself, his principal may sue on it without any endorsement.—*Stinson v. Sachs* 391

NEGOTIABLE INSTRUMENTS—Continued.

2. *Accommodation Paper—Instructions.* In an action upon a promissory note against two makers thereof, where the issue made by one is that she executed the note without a consideration as an accommodation maker and for the sole purpose of enabling plaintiff to borrow money thereon for his own use and benefit, a charge to the jury to find for plaintiff if there was a consideration moving to either one of the makers is erroneous.—*Weeks v. Bussell*. 40

NEW TRIAL.

- Newly Discovered Evidence.* Where a personal judgment has been obtained against defendant in an action to foreclose a livery stable keeper's lien, defendant is entitled to a new trial upon an application showing that plaintiff had written him a letter the absence of which at the trial was fully explained, notifying him that he would resort to his lien upon the horses for their keep, upon which defendant had relied; and that the plaintiff, instead of pursuing that remedy, waited until the bill against the horses had greatly increased, and then sought to hold the defendant for its payment.—*Lafond v. Smith* 36

See APPEAL, 18, 19; CRIMINAL LAW, 1.

NUISANCE.

1. *Prosecution of Employé for Maintaining Powder Magazine—Evidence.* Where the substance of the charge, in an information for maintaining a nuisance, is that the defendant unlawfully maintained a powder magazine in a thickly settled neighborhood, evidence is inadmissible for the purpose of showing that the explosives stored therein had been recklessly managed while being carried from vessels to the magazine, and while being loaded upon cars for transportation abroad.—*State v. Paggell* 579
2. *Same—Judgment Abating Nuisance.* Upon the prosecution of an employé of a powder company for maintaining a public nuisance, judgment upon his conviction ordering that the nuisance be abated is erroneous.—*Id.* 579

OFFICE AND OFFICER.

1. *Verification Before Deputy Clerk.* When an information is verified before a deputy county clerk, the verification is sufficient whether the jurat is signed by the deputy clerk in his own name as deputy or in the name of his principal by himself as deputy.—*State v. Rosener* 42

OFFICE AND OFFICER—CONTINUED.

2. *State Capitol Commissioner—Power of Governor to Remove from Office—Notice.* The act of March 21, 1893, in relation to state capitol commissioners, provides that "The commissioners so appointed shall hold office till the completion of said building and the acceptance thereof by the state unless sooner removed for cause by the governor," and, as such act contains no provision concerning the method of removal, it must be construed in connection with a prior act of the same session (Laws 1893, p. 247), providing for the removal from office by the governor of all state officers appointed by him who are not liable to impeachment; and, construing these acts together, the legislative intent is plain that the tenure of office of an appointive member of the capitol commission should be indefinite, and such officer liable to removal without a hearing for misconduct, malfeasance or incompetency, when the governor should be satisfied that any such causes exist.—*State, ex rel. McReavy, v. Burke*..... 412
3. *County Auditor—Authority to Administer Oaths.* As all laws were continued in force and all officers continued in office by Const., art. 27, §§ 2, 6, the county auditor is an officer duly authorized to administer oaths as provided by § 2717, Code 1881.—*Garneau v. Port Blakely Mill Co.*..... 467
4. *Non-feasance in Office.* When the chief executive duties of a city are confided by its charter to the board of public works, and it is given control of all public work, the water system, streets, sewers, wharves, parks, lights, city property, and street improvements and assessments, and the members are paid a salary of \$1,500 per year, payable monthly, a member of the board is guilty of non-feasance in office when he confines his services to attendance upon the meetings of the board, whose meetings are about fifteen in number per month, lasting about one hour each, and neglects to personally visit and inspect any of the public works going on under the direction of the board, some of them involving unnecessary and extravagant expenditure, on which reports are made to the council without personal knowledge on the part of such member of the character of the work.—*State, ex rel. Heilbron, v. Van Brocklin*..... 557

See MUNICIPAL CORPORATIONS, 2, 3; QUO WARRANTO, 1-8.

PARTNERSHIP.

1. *What Constitutes—Partnership or Lease.* Partnership between the lessor and the lessees of premises is not consti-

NEGOTIABLE INSTRUMENTS—CONTINUED.

2. *Accommodation Paper—Instructions.* In an action upon a promissory note against two makers thereof, where the issue made by one is that she executed the note without a consideration as an accommodation maker and for the sole purpose of enabling plaintiff to borrow money thereon for his own use and benefit, a charge to the jury to find for plaintiff if there was a consideration moving to either one of the makers is erroneous.—*Weeks v. Bussell*..... 440

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PARTNERSHIP.

1. *What Constitutes—Partnership or Lease.* Partnership between the lessor and the lessees of premises is not consti-

PARTNERSHIP—CONTINUED.

tuted by an agreement that the lessor shall have as rent therefor one-half of all the profits realized above expenses by the lessees in managing the premises as a sanitarium, although the agreement may provide that the board and lodging of the families of the lessees while residing on the premises and engaged in said management, and their necessary personal expenses while engaged therein, may be included in computing expenses, "but they are to receive no other compensation for their services," when all the other terms of the agreement indicate that it was intended by the parties as a lease.—*Z. C. Miles Co. v. Gordon*..... 442

2. *Dissolution—Receiver—Reduction of Partnership Assets.* When a receiver has been appointed in a suit for the dissolution of a partnership, one partner cannot subsequently, by means of a cross complaint, bring in other parties with whom it is alleged that his partner has fraudulently conspired to procure a lease of the premises upon which the partnership business was being conducted.—*Capecci v. Al-ladio*..... 637

3. *Same.* The proper practice in such a case would be for the receiver to institute the proceeding necessary for reducing the contract of lease to his possession for the benefit of the partnership.—*Id.*..... 637

4. *Procurement of Lease of Partnership Premises Pending Dis-solution.* Although one partner cannot, where partnership affairs are unsettled, acquire a lease of property which has been used in conducting the business of the partnership, yet the fact that the father-in-law and mother-in-law of one partner, with knowledge of a prospective dissolution of the firm, contract for a lease of the premises at the close of the current lease, will not make them accountable therefor to the partnership, when there is no showing that the contract was made through them in the interest of the son-in-law and for the purpose of circumventing his partner.—*Id.*..... 637

PARTY WALLS.

1. *Action for Cost—Evidence.* In an action for the recovery of the cost of construction of one-half of a party wall, the testimony of the architect as to the proportion such party wall bore to the cost of the whole building is *prima facie* sufficient to establish its cost.—*Prefontaine v. Mc-Micken*..... 694
2. *Same.* In such a case, the testimony of the architect that one-half of the cost of the construction of a party wall had

PARTY WALLS—CONTINUED.

not been paid by the party who contracted to pay it, is sufficient *prima facie* evidence to establish non-payment.—*Id.* 694

3. *Same.* In an action against the parties to a party wall contract proof on the part of the plaintiff that ownership in the land charged with the party wall still continued in the defendants, who were the contracting parties, is unnecessary, as want of ownership is more properly a matter of defense.—*Id.* 694

PLEADING.

1. *Pleading—Demurrer.* The pendency of another suit between the same parties for the same cause of action cannot be raised by demurrer unless such fact appears on the face of the complaint.—*Lowman v. West.* 355
2. *Same.* A demurrer does not lie to a single paragraph of a complaint unless it purports to present a complete cause of action.—*Id.* 355
3. *Amendment of Complaint Pending Trial.* The amendment of plaintiff's complaint during the progress of the trial is a matter within the discretion of the court, and no error can be founded thereon when it appears that no different answer was thereby required; that the defendant was not taken by surprise, and did not ask for time to prepare an answer to the matters covered by the amendment.—*Hulbert v. Brackett.* 488
4. *Answer—Negative Pregnant.* In an action of replevin to recover possession of a city warrant which plaintiff alleges came into its hands by endorsement, an answer alleging "that whether said warrant came into the hands of plaintiff as alleged, this defendant has no knowledge or information sufficient to form a belief, and he therefore denies the same," is an insufficient denial, for the reason that it constitutes a negative pregnant.—*Seattle National Bank v. Meerwaldt.* 680
5. *Same—Denial upon Information and Belief.* Where the complaint in such action alleges that plaintiff "forwarded and delivered unto the bank of Port Angeles into the hands of one B. F. Schwartz, the then manager of said bank, the said warrant with the following endorsement thereon, to wit: 'For collection and credit account of Seattle National Bank, Seattle, Wash.; signed, Robert G. Hooker, cashier,'" a denial of such allegations on information and belief is sufficient, although defendant is in possession of the war-

PLEADING—CONTINUED.

- rant and could have had actual knowledge of the endorsement, as the material allegation of the complaint goes to the fact of the forwarding and delivery of the warrant, and not to that of its endorsement.—*Id.*..... 630
6. *Same—Sufficiency of Denial.* Although a paragraph of the complaint may allege several distinct matters, an answer thereto constitutes a sufficient denial when it alleges "that whether the matters and things set forth [in said paragraph] are true or false, defendant has no knowledge or information sufficient whereof to form a belief, and he therefore denies the same."—*Id.*..... 630
7. *Same.* A paragraph of answer denying the allegations of a specific paragraph of the complaint is sufficient to raise an issue without being addressed to the allegations contained in other portions of the complaint, although having a direct bearing on the subject matter of the issue presented.—*Id.*..... 630
- See APPEAL, 15; FORCIBLE ENTRY AND DETAINER, 1-4; FRAUDULENT CONVEYANCES, 3; INJUNCTION, 1; INSURANCE, 4; LANDLORD AND TENANT, 2; MORTGAGES, 2; WATERS AND WATERCOURSES, 2.

PRACTICE IN CIVIL CASES.

1. *Non-Suit.* A judgment of non-suit will not be reversed if any one of the several grounds for the motion therefor is sufficient, although the court may have founded his ruling upon an inadequate reason.—*Brennan v. Front St. Cable Ry. Co.*..... 363
2. *Same—Contributory Negligence.* Although contributory negligence is a matter of defense in this state, yet where in an action for damages as a result of defendant's negligence it appears by the plaintiff's case that he is chargeable with contributory negligence, the defendant is entitled to a non-suit.—*Id.*..... 363
3. *Time of Pleading.* The ruling of the trial court permitting plaintiff to file a reply on the same day that defendant moves for judgment on the pleadings because of failure to reply, will not be disturbed, when there is no showing of abuse of discretion.—*Stinson v. Sachs*..... 391
4. *Death of Defendant—Substitution of Administrator.* An order, made upon the *ex parte* application of plaintiffs, substituting an administrator as a party to the action upon the death of defendant, is not erroneous on the ground that it

PRACTICE IN CIVIL CASES—CONTINUED.

- was made without notice to the administrator.—*Strong v. Eldridge* 595

PRINCIPAL AND AGENT.

- Right of Agent to Delegate Authority.* An agent employed by the general soliciting agent of an insurance company to solicit insurance has no implied power to bind his principal by contracting with another for the rendition of similar services.—*Stinson v. Sachs* 391

See NEGOTIABLE INSTRUMENTS, 1.

PRINCIPAL AND SURETY. See BONDS, 3, 4, 8-10; JUDGMENT, 5.

PROHIBITION, WRIT OF.

1. *Pleading—Petition.* Prohibition will not lie unless it appears from the petition therefor that there is some threatened injury for which the petitioner has no other adequate remedy.—*Harris v. Brooker* 138
2. *When Lies—Objection to Jurisdiction of Court.* Objection to the jurisdiction of a court must be first raised in the court itself before it can be subjected to a writ of prohibition on the ground of want of jurisdiction.—*Id* 138
3. *Proceedings for Contempt.* An alternative writ of prohibition against a superior judge will be made perpetual to prevent his carrying into effect a void judgment of contempt, when he has refused upon motion to set aside the judgment, although the return to the alternative writ may recite that the court has no intention of further proceeding in the matter.—*State, ex rel. Hunter, v. Langhorne* 447
4. *When Lies—Attempt of Lower Court to Interfere With Judgment of Supreme Court.* Where a proceeding is instituted in the lower court for the purpose of vacating or modifying a judgment rendered by the supreme court on appeal, the question of the jurisdiction of the lower court is involved to such an extent that the supreme court is authorized, upon an application for a writ of prohibition, to review such proceeding and prohibit it when, in fact, it would be an unwarranted interference with such judgment.—*State, ex rel. Wolferman, v. Superior Court* 591

PUBLIC LANDS.

1. *Sale of School Lands—Recovery of Value of Improvements.* Where school lands have been improved by a tenant, and the

PUBLIC LANDS—CONTINUED.

- land afterward appraised by the county commissioners and offered for sale, no appraisal of the improvements having been made, the tenant is entitled to the value of his improvements upon the sale of the land, and may recover therefor, although still in possession.—*Wilkes v. Davies*..... 112
2. *Tide Lands—Right to Purchase—Appeal From State Board of Equalization—Notice.* Notice of appeal to the superior court from the decision of the state board of equalization on a contest between applicants for the purchase of tide lands must, under §§ 2170, 2171, Gen. Stat., be filed with said board within ten days after the rendition of the decision appealed from.—*Union Wharf Co. v. Katz*..... 389
3. *School Lands—Expenses of Sale—Services of Auctioneer.* Under Laws 1889-90, p. 441, requiring county commissioners to make sales at public auction of school lands, and providing payment for their services and necessary expenses, the commissioners are not authorized to include in the expense account the commission of professional auctioneers employed by them to cry the sales.—*Bickerton v. Grimes*..... 451
4. *Tide Lands—Improvement by Artificial Oyster Beds—Application to Purchase—Jurisdiction of State Board.* The state board of land commissioners has no jurisdiction to pass upon the right of an applicant for the purchase of tide lands which he claims to have improved as an artificial oyster bed, when the hearing is not based upon a contest nor upon an appeal, but is founded upon a protest of citizens, setting up that the lands are natural oyster beds, as the commissioner of public lands is vested by law with the duty of determining what lands are subject to sale.—*State, ex rel. Smith, v. Forrest*..... 610
5. *Same—Natural Oyster Beds—Presumption in Absence of Reservation by Appraisers.* The act of 1891, directing the reservation of natural oyster beds, does not require a suspension of sales of tide lands until the oyster reserves have been defined and plats filed; and where the county appraisers have neglected to note on the tide land maps that certain land is an oyster reserve, the commissioner of public lands is warranted in presuming that such land is subject to sale.—*Id*..... 610
6. *Same—Proof on Application for Purchase.* An applicant for the purchase of tide lands, which he or his assigns had improved as an artificial oyster bed prior to the act of March 26, 1890, giving a right of purchase, must prove to

PUBLIC LANDS—CONTINUED.

the satisfaction of the commissioner of public lands that such land was not a natural oyster bed at time of entry thereon.—*Id* 610

7. *Same—Vested Rights—Authority of a State to Alter Law Giving Preference Right of Purchase.* The act of March 26, 1890, giving the improver of tide lands prior to that date a preference right of purchase does not constitute a contract between the state and the improver giving him any vested rights in such lands, but the right of purchase given him is merely a privilege which he has a right to exercise only while the law remains in force; and in case such privilege has not been exercised, the state may, by a subsequent law, provide for the use and occupation of the tide lands for other purposes without its being an impairment of any obligation due to the prior improver thereof.—*Allen v. Forrest* 700

See INJUNCTION, 3.

QUIETING TITLE.

1. *Title Derived Through Execution Sale—Presumption as to Regularity.* In an action to quiet title to land purchased upon execution sale, proof of the sale made by the sheriff under a valid judgment and execution, and the confirmation thereof by the court, will establish a *prima facie* presumption that the sale was regularly made.—*Tacoma Grocery Company v. Draham* 268
2. *Action by Heir Prior to Distribution.* An action to quiet title cannot be maintained by an heir until after the close of the administration upon his ancestor's estate.—*Hazelton v. Bogardus* 102

QUO WARRANTO.

1. *When Lies—Review of Action of Mayor in Removing an Officer.* Although the charter of a city authorizes the mayor to remove any appointive officer for cause, after a hearing upon charges preferred which is judicial in its character, yet, under Code Proc., § 879, quo warranto, and not certiorari, is the proper action for reviewing the legality of the proceedings before the mayor.—*State, ex rel. Heilbron, v. Van Brocklin* 557
2. *Pleading and Proof.* In an action of quo warranto by a member of the board of public works of the city of Seattle, who had been removed from office by the mayor on the ground that he had violated a provision of the city charter

QUO WARRANTO—CONTINUED.

- declaring that no member of any board shall be directly or indirectly interested in any contract with the city or for its use, the charge being that the board of public works had voted to place insurance on property of the city with certain companies represented in Seattle by a corporation of which the relator was a stockholder, an answer setting up that the relator had been found to be a trustee in such corporation does not accord with the charge, and is demurrable.—*Id.* 557
3. *Judgment for Salary.* In an action of quo warranto judgment for damages against the defendant is unwarranted where there is no showing that he had collected any of the salary of the office.—*Id.* 557

RAILROADS. See CHATTEL MORTGAGES, 8; RECEIVERS, 2.

RECEIVERS.

1. *Right to Property Held Under Attachment.* A receiver appointed by the court under an order directing him generally to take possession of the property of an insolvent corporation takes no title to property of the corporation in the actual possession of the sheriff under an attachment lien, when the sheriff and the lienors have not been made parties to the action in which the receiver was appointed.—*State, ex rel. Hunt, v. Superior Court* 210
2. *Effect of Appointment—Priorities Between Creditors and Mortgagee.* The appointment of a receiver of a railroad corporation has the same effect in law as though the creditors, whom he represents, had taken possession of the rolling stock under legal proceedings, and the right of a mortgagee to take possession of the rolling stock does not give the mortgagee any priority over creditors, when its right of possession accrues subsequent to the appointment of the receiver.—*Radebaugh v. Tacoma & Puyallup R. R. Co.* 570

See APPEAL, 26-28; CORPORATIONS, 6, 7; PARTNERSHIP, 2, 3.

REFERENCE.

Refusal of Adjournment—Objection Not Raised Below. Where a case has been referred to a referee to take proofs and report same to the court, the refusal of the referee to grant a request for an adjournment, which was not objected to at the time, nor upon the trial before the court subsequently upon the report of the referee, cannot be raised as ground

REFERENCE—CONTINUED.

- of error for the first time on appeal.—*Tacoma Grocery Co. v. Draham*..... 263

REPLEVIN.

1. *Demand Prior to Action.* Where the defendant in an action of replevin has set himself up as the owner of the chattel in controversy, the necessity of demand upon him prior to the institution of the action is excused.—*Seattle National Bank v. Meerwaldt*..... 630
2. *Necessary Parties.* In an action of replevin the one in possession of the chattel claimed is the only necessary defendant, although an interest therein may be asserted by others.—*Id.*..... 630
3. *Judgment.* The judgment in favor of plaintiff in an action of replevin should be for the possession of the personal property in controversy, or in case delivery cannot be had, for the value, with damages, for the detention.—*Id.*..... 630

RESCISSION. See LANDLORD AND TENANT, 1-3; SALE, 3.

SALE.

1. *What Constitutes.* A finding of the trial court in an action at law that a sale of certain property was an absolute one will not be set aside when it appears from the evidence that the sale was made in consideration of a valid indebtedness from the seller to the purchaser, which was equal to the value of the property, and that the purchaser immediately took possession under the bill of sale and commenced disposing of the property as his own, although it appears that the purchaser was ignorant of the value of the property; that, at or near the same time the bill of sale was given, certain accounts were assigned by the seller to the purchaser; and that the testimony in regard to the cancellation by the purchaser of a promissory note as part of the consideration was not clear and satisfactory.—*Hall v. Matthews*..... 407
2. *Bill of Sale—Indefinite Description of Property—Possession of Purchaser.* Although the description of property contained in a bill of sale thereof may be too uncertain and indefinite to indicate what property is included, yet where the purchaser has taken possession thereof his title is superior to that of a subsequent mortgagee of the property.—*Reed v. Bank of Commerce*..... 539
3. *Delivery—Rescission.* An order for goods cannot be rescinded on the ground that it is an executory contract,

SALE — CONTINUED.

when the sale has been consummated by delivery to the carrier for shipment prior to the receipt of a countermand by mail.—*Whitman Agricultural Co. v. Strand*..... 647

4. *Bill of Sale as Chattel Mortgage—Evidence.* Where, at the time of the execution of a bill of sale by a debtor to his creditor the undisputed proof shows that there was no reservation of any right to the property or to the proceeds thereof by the vendor, the presumption that the instrument is a bill of sale and not a chattel mortgage is not overcome by testimony that the purchaser admitted that if he made more out of the property than would pay the total amount due him he would be willing to pay the overplus to his vendor; nor by testimony showing that after the execution of the alleged bill of sale the purchaser took a mortgage on other property of the vendor as security for any deficit remaining after the application to his debt of the proceeds of the property covered by the bill of sale; and that at another time he sought to get money from the vendor in reduction of the amount of such indebtedness.—*Hammer v. O'Loughlin*..... 393

See CHATTEL MORTGAGES, 1; FRAUDS, STATUTE OF, 1.

SCHOOL LANDS. See PUBLIC LANDS, 1, 3.

SEDUCTION.

What Constitutes. Where the inducements for sexual intercourse held out by a man to a girl of twelve years of age consisted in kissing and fondling her and feeling of her person, and in representations to her that it was not wrong to have sexual intercourse, and that he would not hurt her, these representations being made and this conduct occurring upon a number of occasions when he attempted to have intercourse with her without accomplishing penetration, and also thereafter when he succeeded, they are sufficient, in view of the girl's tender age, to constitute the offense of seduction.—*State v. Carter*..... 273

SHERIFFS AND CONSTABLES.

1. *Action Against, for Failure to Serve Writ—Evidence.* There is sufficient evidence to sustain a verdict in an action against a sheriff for failure to serve a writ of attachment, when it is shown that the attachment defendant, at the time of the issuance of the writ, had property in the county subject to seizure; that plaintiff's attorney gave the deputy

SHERIFFS AND CONSTABLES—CONTINUED.

- sheriff a list of the property within an hour after the writ had been left at the sheriff's office for service, and told him that if he would go to the plaintiff, whose residence was near that of defendant, the plaintiff would point out the property to him; that within a day thereafter said deputy again approached plaintiff's attorney and asked for his fee for serving the papers, and said that he had no trouble in finding the property, but did not say as to whether he had made any levy; and that in fact no levy was ever made.—*Zelinsky v. Price*..... 256
2. *Same*. In such an action it is not error to admit the testimony of plaintiff showing that the deputy sheriff came to him one day and that he pointed out the defendant's residence and told the deputy defendant had a number of horses, which the deputy would find by going over there; and that said deputy had some papers sticking out of his pocket, but that plaintiff could not tell whether they were the summons and writ of attachment against defendant; such testimony is admissible as tending to show information furnished the officer that the defendant had property subject to seizure upon the writ.—*Id.*..... 256
3. *Wrongful Levy—Action by Sheriff On Indemnity Bond*. Where the sheriff has levied upon certain property as the goods of the defendant in an attachment proceeding, and, acting under an indemnity bond and by the direction of the plaintiff, has held possession of the property against the rightful claim of a third party, and has been compelled to satisfy a judgment against himself obtained by said third party by reason of such wrongful levy, the title to such property passes to the sheriff in trust for the attachment plaintiff; and the disposal of such property by the sheriff at private sale by the direction of the attachment plaintiff, does not amount to a trespass, nor prejudice his right of recovery upon the indemnity bond.—*Barnett v. O'Loughlin*.. 260
4. *Sale of Attached Property—Expenses for its Care*. The necessary expenses incurred by the sheriff in taking care of attached property by direction of the plaintiff, pending litigation as to its actual ownership, form a proper charge against plaintiff, and may be retained from the proceeds derived from the sale of the property.—*Id.*..... 260

SPECIFIC PERFORMANCE.

1. *Performance by Plaintiff—Sufficiency of Tender*. Where a real estate broker, at the time of negotiating a sale, has

SPECIFIC PERFORMANCE—CONTINUED.

contracted with the purchaser to purchase back the land in one year at an advance of twenty per cent. upon the price, if the purchaser should so elect, and the purchaser has taken a bond for a deed from the owner of the land in which time was made of the essence of the contract, and full payment has not been made within the stipulated time, the purchaser cannot recover from the broker by offering to have all right and title acquired under the bond transferred to the broker, but the purchaser must tender a deed conveying a good and sufficient title.—*Landers v. McIntyre*..... 203

2. *Indefinite Contract.* A contract for the purchase of lands at the expiration of one year from date in consideration that the parties of the second part "will, through the Tacoma Ledger, use their best endeavors to advance the value of said lands," and other lands of the party of first part in the vicinity thereof, is not founded upon a consideration which can be specifically enforced, owing to its indefiniteness, and, consequently, does not afford a sufficient consideration to support an action for specific performance in behalf of the parties of the second part.—*Barton v. Spinning*..... 458
3. *Enforcement—Ability of Plaintiff to Perform.* Where an option for the purchase of lands one year from date was given in consideration of the plaintiffs' using their best endeavors to advance the value of adjacent lands through the columns of a daily paper upon which they were employed, plaintiffs are not entitled to a decree of specific performance when the proofs show that it was beyond their power to make such use of the columns of said paper as was contemplated by the contract, and that they refused when requested to perform their part of the contract, whereupon they had been notified that the option was no longer in force.—*Id*..... 458
4. *Contract by One Spouse for Conveyance of Community Land—Estoppel.* Although a contract for the sale of community land as finally committed to writing is signed by the husband alone, yet the wife is estopped to deny her interest in the contract, when it was made by her husband at her request, with her knowledge and consent as to its terms, and she has allowed the other party to the contract to perform his part of it, and has accepted the fruits of it.—*Konerup v. Frandsen*..... 551
5. *Same.* Where an agreement for the sale of land, which is made at the request and with the full knowledge, acqui-

SPECIFIC PERFORMANCE—CONTINUED.

- escence, consent and ratification of the vendor's wife, recites that the vendor named in the contract is the owner of the land, the wife is estopped from setting up any title to the land.—*Id* 551
6. *Action to Enforce—Alternative Prayer for Damages.* The fact that in an action for the specific performance of a contract to convey land the complaint contains an alternative prayer for damages in case performance can not be had, will not deprive a court of equity of jurisdiction of the action. (*Morgan v. Bell*, 8 Wash. 554, distinguished.)—*Id* 551
7. *Performance by Plaintiff—Non-Payment of Judgment for Purchase Price.* A contract for the sale of a mill cannot be specifically enforced by the purchaser, when there is an outstanding judgment against him for the payment of one installment of the purchase price, without first requiring the payment of the judgment, and its payment subsequent to the rendition of the decree of specific performance will not avail plaintiff on appeal, if it has not been paid in compliance with such decree.—*Wintermute v. Carner*..... 585

STATES AND STATE OFFICERS. See OFFICE AND OFFICER, 2; PUBLIC LANDS, 4.

STATUTES.

Construction—Legislative Interpretation. The opinion of the legislature as to the construction of a law can have no force, unless such opinion is enacted into a law.—*Graves v. Seattle*..... 248

See OFFICE AND OFFICER, 2.

TAXATION.

1. *Tax Deed—What Law Governs Execution.* The provisions of art. 9, § 34, of the freeholders' charter of Seattle relating to the execution of deeds for property sold for delinquent taxes, and providing "that no such deed shall be made until the notice is given that a tax deed will be applied for and such notice duly served as prescribed in the laws of the state of Washington relating to property sold for state or county taxes," merely refers to the law in force at the time of the execution of the deed, and not to that which was in force at the time of framing the charter.—*Ford v. Durie* 87
2. *Same.* Where a sale for delinquent taxes has been made under the revenue act of 1891, which required no notice of

TAXATION—CONTINUED.

the application for a tax deed, that law will govern the execution of the deed under such sale, although prior to its execution the law of 1893, requiring notice to be given, may have taken effect.—*Id.*..... 87

3. *In Cities of First Class—Time of Levy.* The statutory provision requiring the common council of a city to make a tax levy within thirty days after the assessment roll has been certified to it, is declaratory instead of mandatory, and failure to strictly comply therewith would not deprive the city of the right to make a tax levy for the year.—*Wingate v. Ketner*..... 94
4. *Same—Basis of Levy.* Although a city of the first class had, under the provisions of its charter, levied a municipal tax for the year 1893, the city had the power, under the act (Laws 1893, p. 167) providing for the assessment and collection of taxes in cities of the first class, to levy an additional tax upon the basis of the tax roll of the county for the year 1893.—*Id.*..... 94
5. *Valuation of Property—When Effective for Tax Purposes.* The valuation of property in a county for the purposes of state and county taxation becomes fixed and certain, not upon the adjournment of the county board of equalization, but upon the completion of the equalization of values by the state board.—*Hunt v. Fawcett*..... 396
6. *Personal Property—Abstract Books.* A set of abstract books, although compiled in the form of abbreviations and cipher, so as to be intelligible to but few persons, is personal property having a money value, and is subject to taxation under the laws of this state.—*Booth & Hanford Abstract Co. v. Phelps*..... 549
7. *Agricultural Lands Within City Limits.* The municipal taxation of agricultural lands included within the corporate limits of a city is not unconstitutional on the ground that it is a taking of private property without just compensation.—*Ferguson v. Snohomish*..... 668

TIDE LANDS. See PUBLIC LANDS, 2, 4-7.

TRESPASS.

Pleading and Proof. Proof of damages subsequent to the commencement of an action is inadmissible under an answer which states "that for the period of one year prior to the commencement of said cause the plaintiff . . . has

TRESPASS—CONTINUED.

wrongfully and oppressively torn down defendant's fences,"
etc.—*Corliss v. Dunning*..... 882

See SHERIFFS AND CONSTABLES, 3.

TRIAL.

1. *Instructions—Exceptions.* An exception to the refusal of the court to give requested instructions is sufficient when in the following form: "The court refused to give instructions requested by the defendant numbered 1, 3, 4, 6, 9 and 10, to the refusal of the court to give each of said instructions number 1, 3, 4, 6, 9 and 10, the defendant then and there duly excepted, and exceptions allowed by the court."—*Bell v. Washington Cedar Shingle Co.*..... 27
2. *Refusal to Instruct Against Unfavorable Inferences.* Where there has been no comment in argument to the jury upon the presence of witnesses brought from long distances, it is not error for the court to refuse to charge that no unfavorable inference is to be drawn by the jury against the credibility of such witnesses, because of the defendants having paid or agreed to pay their necessary expenses in attending the trial.—*Klepsch v. Donald*..... 162
3. *Objections to Evidence.* In an action by a wife for damages for the wrongful attachment of property which her husband had transferred to her in payment of a loan by her to him, and where, for the purpose of proving the *bona fides* of the transaction, she was attempting to show that she had received a certain sum from her father's estate which constituted the loan to her husband, it was not error to admit in evidence a copy of her receipt for the amount to the representative of her father's estate, when the only objection made thereto was that it was secondary evidence, although the original receipt itself would have been inadmissible, if objected to on the ground of incompetency.—*Liebenthal v. Price*..... 206
4. *Instructions—Refusal of Requests For.* It is not prejudicial error to refuse to give proper instructions in the language of requests therefor, when the court in other instructions substantially covers the same questions.—*Edison, etc., Co. v. Navigation Co.*..... 870
5. *Instructions—Exceptions to, in Presence of Jury.* The refusal of the court to allow counsel to except orally in the presence of the jury to the instructions given is not error.—*State v. Coella*..... 512

TRIAL—CONTINUED.

6. *Equitable Causes—Findings of Fact.* Sec. 379, Code Proc., requiring the court to make findings of fact in actions tried without a jury, has no application to causes of equitable cognizance.—*Wintermute v. Carner*..... 585
7. *Same—Trial of Questions of Fact.* In equitable causes it is discretionary with the court to submit questions of fact to the jury, or to try all the issues itself.—*Id*..... 585
8. *Action on Contract—Instructions.* In an action to recover upon an express contract for the sale of logs, an instruction that if defendant had converted the logs to its own use it would be liable for their value, is erroneous.—*Comegys v. American Lumber Co*..... 661

See APPEAL, 6, 20, 23, 24; CONTRACTS, 5, 6; CORPORATIONS, 9-11; FRAUDULENT CONVEYANCES, 1; HOMICIDE, 5, 8, 10; MASTER AND SERVANT, 2; NEGOTIABLE INSTRUMENTS, 2.

WATERS AND WATERCOURSES.

1. *Diversion—Underground Stream.* A riparian owner is not entitled to damages for the diversion of the waters of a stream tributary to a lake at whose outlet he was operating a mill, when the evidence shows that in the wet season there was abundance of water in the lake and stream, but in the summer season the stream ceased to flow into the lake over the surface of the ground, and there is nothing in the proofs tending to show that the water percolating below the surface was confined to a space immediately below or near the actual bed of the stream, although the proofs may show that the whole valley or watershed of the stream had an underlying impervious stratum; that such stratum was covered by a deposit of gravel of varying depth, and that the trend of this impervious stratum from each side of the stream was, in general, toward the bed thereof.—*Meyer v. Tacoma Light & Water Co* 144
2. *Diverting Water from Stream—Action for Damages—Complaint.* In an action by a riparian proprietor of lands for damages for the diversion of water from a flowing stream, it is not necessary that the complaint allege that the plaintiff had the right to use the water of the creek, or any portion of it.—*Shotwell v. Dodge*..... 937
3. *Same.* Where a lower riparian proprietor can make use of the waters of a flowing stream for purposes of irrigation and domestic use only by means of a dam which floods the

WATERS AND WATERCOURSES—CONTINUED.

waters back upon the land of an upper riparian proprietor, he is not in a position to recover damages for the diversion of a portion of the waters of the stream by the upper proprietor.—*Id.*..... 387

4. *Same—Nominal Damages.* Where an upper riparian proprietor diverts a considerable portion of the water from a flowing stream without showing a reasonable use thereof, a lower proprietor is entitled to nominal damages.—*Id.*..... 387

WITNESS.

1. *Cross Examination.* In such a case, where defendant's witness has testified that the machinery in use at the time the accident occurred was properly constructed and in good condition, it is not proper cross examination to question him as to changes made subsequent to the accident.—*Bell v. Washington Cedar Shingle Co.*..... 27
2. *Credibility—Impeaching Absent Witness.* Where the prosecution, in order to avoid a continuance on account of the absence of a material witness of the accused, has admitted that the testimony set forth in the affidavit for continuance would be given by such witness, if present, the state cannot subsequently undertake to impeach said witness by introducing another witness to testify that the absent witness had made different statements to him.—*State v. Carter*..... 272
3. *Corroboration After Impeachment of Witness.* Where it is sought to impeach a witness by proof that the testimony given by him on the trial as to a certain matter was at variance with a statement made by him prior to the trial, the evidence of others who heard his statement is admissible in rebuttal of the impeaching testimony.—*State v. Manville*.... 523

See EVIDENCE, 3.

WORDS AND PHRASES.

"Grading," see MUNICIPAL CORPORATIONS, 9.

See, also, *Id.*

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